Beverly California Corporation f/k/a Beverly Enterprises, its Operating Regional Offices, Wholly-Owned Subsidiaries and Individual Facilities and each of them *and* District 1199P, National Union of Hospital and Health Care Employees, SEIU, AFL–CIO *and* New England Health Care Employees Union, District 1199/S.E.I.U., AFL-CIO *and* International Brotherhood of Teamsters Local Union No. 385, AFL–CIO *and* District 1199P, Union of Hospital and Health Care a/w Service Employees International Union, AFL–CIO–CLC *and* Service Employees International Union Local 285, AFL–CIO–CLC *and* National Health Care Union, Division of National Association of Government Employees (N.A.G.E.), SEIU, AFL–CIO *and* Service Employees International Union Local 50, AFL–CIO *and* United Food and Commercial Workers International Union, Local 1063, AFL–CIO, CLC *and* Communications Workers of America Local Union 3114, AFL–CIO *and* District 1199, The Health Care and Social Services Union, SEIU, AFL–CIO *and* United Food and Commercial Workers Local 204, AFL–CIO, CLC.

Beverly Enterprises–Illinois, Inc. d/b/a East Moline Care Center and District 119, Indiana/Iowa Union of Hospital and Health Care Employees, SEIU, AFL–CIO, Petitioner.

Beverly Enterprises—Ohio d/b/a Northcrest Nursing Home and District 119, The Health Care and Social Services Union, SEIU, AFL–CIO, Petitioner. Cases 6–CA–24221, 6–CA–22084–23 (formerly 34–CA–5443), 6–CA–25548–4 (formerly 34–CA–5652), 6–CA–22084–24 (formerly 12–CA–14857), 6–CA–22084–29 (formerly 33–CA–9745), 6–CA–25548–1 (formerly 1–CA–29418), 6–CA–25548 (formerly 34–CA–55652), 6–CA–25548–5 (formerly 34–CA–5805), 6–CA–25548–6 (formerly 14–CA–2283), 6–CA–25548–7 (formerly 10–CA–26355), 6–CA–25548–10 (formerly 10–CA–26523), 6–CA–25548–8 (formerly 15–CA–11885–1), 6–CA–25548–9 (formerly 8–CA–25067), 6–CA–25548–11 (formerly 11–CA–15631), 6–CA–2248–12 (formerly 11–CA–15863), 6–RC–10752 (formerly 33–RC–3724), and 6–RC–11201 (formerly 8–RC–14773)

August 21, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On June 12, 1995, Administrative Law Judge Lawrence W. Cullen issued the attached decision.[1] The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief.[2] The General Counsel filed exceptions, a supporting brief, and an answering brief.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions[5]

[1] On February 15, 1996, the Board granted a motion to sever one of the consolidated cases, Case 6–RC–10907 (formerly Case 10–RC–14319), and to remand it to Region 10 for appropriate action. On June 2, 1997, the Board granted a motion to sever another of the consolidated cases, Case 6–RC–10906 (formerly Case 15–RC–7701), and to remand it to Region 15 for appropriate action. Thus, these cases are no longer at issue here.

[2] The Respondent also filed several motions. We deny as moot its motion in limine concerning the manner in which the General Counsel argued his request for expenses associated with litigating the single-employer issue in light of our rejection of the related General Counsel motion, discussed below. Moreover, we note that according to Black's Law Dictionary 914 (rev. 5th ed. 1979), a motion in limine "is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements." We also deny the Respondent's motion to reopen the record for further evidence concerning the judge's recommended bargaining order at the Respondent's East Moline Care Center in East Moline, Illinois, in light of our decision below finding that a bargaining order is not warranted.

[3] We deny the General Counsel's request for reimbursement of costs and expenses related to the litigation of the Respondent's single-employer status because we do not agree with the General Counsel that the Respondent's arguments were clearly frivolous.

[4] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the following errors of the judge, which do not affect our decision. Contrary to the judge's finding of fact, Flynn, the director of environmental services at Greenwood Health Center in Hartford, Connecticut, did not admit that he made no reference to the pending grievance at the first employee meeting at issue, and instead testified that he did refer to the grievance; but the judge's other findings accurately reflected the balance of Flynn's testimony, i.e., Flynn did admit that he did not speak to the union delegate before the meeting and did not address the delegate in his union capacity during the meeting. With respect to the election at Northcrest Nursing Home in Napoleon, Ohio, the correct tally of ballots was 36 employees for and 39 against union representation. Further, with respect to the same facility, the judge incorrectly stated that the administrator was not involved in the decision to suspend employee Schriner, but we note that the judge correctly found that the other two management officials involved in the action were not from the facility but rather from the regional and corporate levels. In finding a violation with respect to this action, the judge erroneously stated that the Respondent, rather than the General Counsel, established a prima facie case.

and to adopt the recommended Order,[6] only to the extent consistent herewith.

1. The judge dismissed the allegation that the Respondent violated Section 8(a)(1) by creating the impression of surveillance of its employees' union activities at William Penn Nursing Center in Lewistown, Pennsylvania. The General Counsel has excepted to the judge's failure to find merit in that allegation. We agree with the General Counsel.

In late December 1991 or early January 1992, after meeting with other employees about work problems, Licensed Practical Nurse Polly Black contacted the Union's representative about forming a union. She then began soliciting union organization cards, discussing with other employees the formation of a union, attending union meetings, and making home visits to other facility employees with a union representative. There was no evidence that she had been identified to facility management as an open union supporter. On the evening of January 14, 1992, Black and a union representative visited the home of another license practical nurse, Colpetzer, who refused to allow them to come into her home to discuss the Union.[7] The next morning, the facility's administrator, Horvath, approached Black and said, "Good morning Mrs. Black, I understand you had a busy night last night." Horvath normally did not address Black by her last name, and as he spoke his nostrils flared and he yanked at his shirt cuff. Black testified that she initially did not respond, but that after Horvath repeated the comment she realized he must have been referring to her visit to Colpetzer's home the prior evening. The administrator then told her he would like to meet with her in his office later that day, at which time he counseled her. The judge found that the counseling was a direct result of Horvath's displeasure with Black's attempting to solicit the unwilling employee's support for the Union and that the counseling constituted verbal harassment in violation of Section 8(a)(1). That same day, Horvath announced a wage increase, which the judge also found violated Section 8(a)(1) because it was timed to stem the union campaign. We adopt the findings of these violations.

The judge dismissed the impression of surveillance allegation, finding that the incident alone was insufficient to create an impression of surveillance and merely was a reference to Black's home visit to Colpetzer, the employee who had denied her access. We disagree. Whether or not Black correctly concluded that Colpetzer was the source of Horvath's information, Horvath did not identify the source to Black nor did he explain what he meant by the comment. Rather, the cryptic comment was made by Horvath in a manner untypical of his usual exchanges with Black and in conjunction with an order that she meet with him later that day. At the subsequent meeting, Horvath made clear to Black his displeasure with the actions he had alluded to earlier in the day. Under these circumstances, we find that the administrator's reference to Black's protected concerted activities clearly conveyed the message that she was being watched and that her union activities were under close scrutiny in violation of Section 8(a)(1).

2. The judge found a number of 8(a)(1) violations involving an unsuccessful union organizing campaign during early 1992 at Deltona Health Care Center in Deltona, Florida. We adopt the findings of these violations.[8]

With respect to the Respondent's West Haven Nursing Facility in West Haven, Connecticut, we note that there is an unresolved testimonial conflict as to how Union Business Agent Frane received the first six copies of warnings provided to her by management in response to the Union's information request, but find that this inconsistency does not affect our adoption of the judge's finding of an 8(a)(5) violation with respect to the provision of information in response to the request

[5] In adopting the judge's finding that the Respondent unlawfully interrogated employees at its East Moline facility, we find it unnecessary to pass on whether Director of Associate Relations Findeiss unlawfully interrogated employee Weimer because any finding of such a violation would be cumulative. Further, in adopting this finding, Chairman Gould does not rely on *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), which he would reverse, see his dissenting opinion in *Beverly California Corp.,* 326 NLRB No. 29 (1998) (*Beverly II*), citing *Beverly Enterprises*, 322 NLRB 334 fn. 1 (1996).

In adopting the finding that the Respondent violated Sec. 8(a)(5) at its West Haven Nursing Facility when its facility management changed dietary department breaktimes, we rely on the judge's conclusion that the change was implemented without affording the Union an opportunity to bargain, and we find insufficient evidence to support the Respondent's assertions that the Union either waived its right to bargain or subsequently condoned the Respondent's unilateral action. In adopting the judge's finding that the Respondent's suspension of employee Schriner at Northcrest Nursing Home violated Sec. 8(a)(3) and (1), we rely on *Mast Advertising*, 304 NLRB 819 (1991), which, although factually involving a grievance meeting rather than a captive audience meeting, supports the general proposition that an employee's intemperate conduct during the course of engaging in protected activity is permitted some leeway without losing the Act's protection. We further find that the related threat of suspension made to Schriner by the Respondent's corporate director of associate relations at the captive audience meeting preceding her actual suspension independently violated Sec.8(a)(1), as reflected in the judge's recommended Order.

[6] The judge inadvertently omitted certain provisions reflecting his findings from his recommended Order and notice. We shall include the appropriate provisions in our Order and notice, as well as provisions consistent with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container,* 325 NLRB No. 14 (1997).

[7] There is evidence that Black and the union representative may have attempted to visit at least one other employee that evening. However, contrary to the General Counsel's assertions, we do not find this evidence to be dispositive to our determination.

[8] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by providing assistance to Deltona employees concerning their retrieval of their union cards, we rely on his conclusion that the assistance provided was coercive in context, and do not reach his further conclusion that the assistance constituted an unlawful interrogation. In adopting the judge's dismissal of the allegation of futility of union support (to which no exceptions were taken), we note that the judge inadvertently omitted the word "not" in the following sentence describing the Respondent's argument on this issue: "As the Respondent argues in its brief, Taylor [the Respondent's director of associate relations for region 3] told the employees that the Respondent would [not] have to agree to any changes . . . ."

Among them is the finding that the Respondent, through the facility's Acting Administrator Kantarze, coercively interrogating employees by placing a large poster outside her office. When she posted it, the poster contained the signatures of a number of department heads beneath the following statements: "We want to give new management a chance. We don't need a union now." There was blank space in which other signatures could be added, and "dozens" of nonsupervisory employees affixed their signatures to the antiunion poster.

The Respondent contends that its action with respect to the posting was not coercive, noting that, contrary to the implication of the judge, when Kantarze posted the petition it included only management signatures and that the judge acknowledged that there was no evidence that anyone actively solicited employee signatures. We reject the Respondent's arguments and adopt the judge's finding that the Respondent's posting violated Section 8(a)(1).

Although we agree that there is no evidence either that the poster included employee signatures when Kantarze placed it on the wall or that the Respondent, through Kantarze or any other management official, explicitly solicited employee signatures, we find that the statements on the poster, together with the space below the posted signatures, would lead observers reasonably to view the poster as a petition for signing. Those who signed signified their support for management and against the Union. Since management officials would have little need to proclaim to employees their own support for giving management a chance, the poster was a clear invitation to employees to signify that they wished to join with management officials in giving them a chance. As noted above, there was evidently ample blank space, since "dozens" of nonmanagement employees had signed the petition, i.e., the employees acted upon the reasonable belief that it was a solicitation.

In sum, the posting was clearly not intended merely as a show of management support for the management position, but rather as a direct appeal to others to join with management. In this manner, the posting was directly analogous to Regional Human Resources Director Taylor's appeal at an employee meeting at the facility during the same period for employees to move to his side of the room to demonstrate their support for management. Both solicitations of open employee support placed employees in the position of joining management in a public display of support or risking the Respondent's displeasure if they did not so. For the same reasons the Taylor action was coercive interrogation, the posting of the notice was coercive interrogation in violation of Section 8(a)(1).[9]

3. We further agree with the judge's findings that certain management conduct during an unsuccessful union campaign at Garden Terrace Nursing Center, Douglasville, Georgia, violated Section 8(a)(1) but that certain conduct did not, and reject as without merit the exceptions of the Respondent and the General Counsel to these findings.[10] In this regard, we adopt the judge's conclusion that the Respondent engaged in disparate enforcement of prohibitions on campaigning when it permitted antiunion campaigning on its premises on election day while, at the same time, it curbed and closely monitored prounion employees' activities. In doing so, we note that the judge found that Ivy, a then-current nonmanagement employee, was among those engaged in antiunion electioneering during election day. The judge found that Ivy was observed standing next to the timeclock and encouraging employees to vote "no" as they arrived and also as they picked up their paychecks. In this regard, the credited evidence indicates both that Ivy was seen in the hallway at the timeclock next to the personnel office right beside the line where employees picked up their pay and that two supervisors were distributing the paychecks during the day. Thus, in adopting the judge's finding, we rely in particular on the fact that Ivy's antiunion electioneering was in plain view of management.

The Respondent has excepted to the judge's finding that it violated Section 8(a)(1) by promoting an independent union through its actions respecting employees Tommie London, Betty Smith, and Anne Ivy, who allegedly urged that course at the Respondent's last captive audience meetings before the election.[11] In particular, the Respondent contends that the employees were acting entirely independently and it had no responsibility for their statements. We disagree, and for the following reasons, find a violation on the basis of the statements by employee London.[12]

Even accepting the testimony of the Respondent's witnesses that Administrator Durham did not know precisely what any of these openly antiunion employees would say when they first requested permission to speak

[9] The Respondent's posting here is not analogous to an employer's permissible distribution of campaign buttons. Clearly, an employer's right to distribute buttons and similar campaign materials is not unfettered, and it may not lawfully distribute campaign paraphernalia in a manner pressuring employees to make an observable choice that demonstrates their support for or rejection of the union. See *Circuit City Stores*, 324 NLRB 147 (1997), and cases cited therein. Thus, even were we to consider this posting akin to the distribution of such paraphernalia, it was nonetheless coercive because under the circumstances here it was accomplished in a manner which pressured employees to indicate their union sentiments.

[10] In adopting the judge's finding of disparate enforcement of a no-discussion rule, we note that the judge's specific factual findings make it clear that he inadvertently erred in stating that "prounion [rather than antiunion] employees were permitted by the Respondent to campaign on Respondent's premises."

[11] It is apparent from the judge's decision that he credited testimony that London told employees at the meetings that they could form their own group or union to deal with management. We also note that the meetings occurred in 1993, not 1994, as the judge inadvertently stated in one place.

[12] We do not rely on the evidence concerning the presentations by employees Ivy and Smith because there is insufficient evidence to show that in their presentations they urged the formation of an in-house organization.

at a meeting, we find that the message of employee London that the employees should form an in-house union was clear at least from her first appearance. She presented her message at the three captive audience meetings held the day before the election, addressing employees on all three shifts; and she was paid by the Respondent for the time spent at its facility beyond her normal duty hours. During these meetings, Durham repeatedly called on London and the other two antiunion employees to present their views. By this means the Respondent tacitly used London as its agent to suggest that the employees might secure a more favorable reception if they looked to an in-house group for representation, a position that neatly dovetailed with the Respondent's position, voiced by Durham in a preelection meeting that they didn't "need outsiders" or "third parties."[13]

4. The judge recommended that the election held at the East Moline Care Center in East Moline, Illinois, be set aside and found that the Respondent's commission of violations of Section 8(a)(1) and parallel objectionable conduct rendered the possibility of a fair rerun election slight.[14] Therefore, the judge further found that the Respondent violated Section 8(a)(5) and (1) when it refused to recognize and bargain with the Union on the basis of valid authorization cards obtained from a majority of unit employees. He thus recommended a bargaining order as the appropriate remedy for such violations pursuant to *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). We disagree and conclude that, under all the circumstances, a *Gissel* bargaining order is not warranted in this case.

In *Gissel Packing*, the Supreme Court approved the use of remedial bargaining orders in two types of cases involving violations of the Act. The first category of "exceptional" cases involves conduct found to be "outrageous" and "pervasive," such as mass terminations. The second category involves "less extraordinary cases" marked by less pervasive unfair labor practices which nonetheless impede the election process. In the latter category, insofar as is pertinent to our analysis here, it must be shown that the employer's misconduct undermined the union's majority status and that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Gissel*, 395 U.S. at 613–615. This case does not fall within the first category because the unfair labor practices are not of the magnitude that the Board has found to be pervasive or outrageous. Thus they must be analyzed under the second category in determining the appropriateness of a *Gissel* bargaining order.[15]

Although the Respondent's unfair labor practices at the East Moline facility were serious, they are not of a nature or number likely to have so widespread or lasting an effect that traditional remedies would be inadequate to ensure a fair election in this unit. The violations were committed over a period of several months, and most consisted of isolated incidents involving few employees. The judge dismissed allegations of more serious misconduct involving discharges of leading union supporters.

Furthermore, as found by the judge, the size of the unit fluctuated during the critical period from between 103 employees on the date of the recognition request to 92 employees as of the election date. We therefore find the unit was a sizable one and that, with the possible exception of a threat to sell the facility made at one of two employee meetings, there was insufficient evidence that Respondent's unlawful conduct directly affected a significant number of unit employees. In a larger unit such as this, the Board has found that the effect of violations is more diluted and more easily dissipated. *Philips Industries*, 295 NLRB 717, 718–719 (1989).[16]

We therefore conclude, based on the judge's findings, which we adopt, that the violations here do not foreclose the possibility of a fair election and that the coercive effects of the Respondent's actions at East Moline can be erased by the use of our traditional remedies. Accordingly, we shall direct the holding of a second election.[17]

5. The judge recommended a broad nationwide cease-and-desist order and nationwide posting of the order at all of the Respondent's facilities. The judge based his recommendation on his review of the Board's decision in *Beverly California Corp*., 310 NLRB 222 (1993) (*Beverly I*), the record and judge's decision in *Beverly California Corp.,* 326 NLRB No. 29 (*Beverly II),* issued this day, and the present proceeding. He acknowledged that in *Torrington Extend-A-Care Employee Association v.*

[13] The circumstances here are distinguishable from *MPG Transport Ltd*., 315 NLRB 489, 493 (1994), in which the statements which most closely linked the employer to an alleged agent who set up an antiunion meeting were assertedly made by that alleged agent. The judge declined to rely on them because that individual, who was one of the employer's employees, did not testify. The only credited evidence that linked the employer to the meeting, which was held off-premises, was that an admitted agent of management had reserved the motel room where the meeting was held. The judge found, however, that there was no evidence that the employer paid for the room, and he credited evidence that the room was reserved at the employee's request.

[14] Contrary to his summary statement on the objections, the judge found merit to Objections 2, 4, 5, 11 through 14, 16, 19, 21, 22, and 30.

[15] As the judge did, we examine the nature and character of only those unfair labor practices committed at East Moline in determining the appropriateness of a bargaining order.

[16] In *Philips Industries*, the Board denied the request for a *Gissel* order, holding that the discharges of two union supporters coupled with a handful of 8(a)(1) violations were insufficient to warrant a bargaining order in a unit of approximately 90 employees.

[17] Consistent with our finding that a *Gissel* bargaining order is not warranted here and our direction of a second election at East Moline, we reverse the judge's finding that the Respondent violated Sec. 8(a)(5) when it refused to bargain with the Union as the exclusive representative of unit employees based on a showing of an authorization card majority.

NLRB, 17 F.3d 580 (1994), the U. S. Court of Appeals for the Second Circuit declined to enforce a similar remedy in *Beverly I* and that the Board ultimately accepted the remand and issued separate remedial orders tailored to the violations found at each of the individual facilities. 316 NLRB 888 (1995). Nonetheless, he found a broad corporatewide order to be appropriate based on the lengthy record of numerous unfair labor practices, including many significant violations; the close monitoring of organizing and labor relations policies through the Respondent's corporate office and as implemented by regional human resource personnel; and the commission of certain unfair labor practices by such personnel, who had received extensive training and have substantial labor relations experience. He essentially found that the Respondent had demonstrated a proclivity to violate the Act and that the violations could not reasonably be viewed as isolated occurrences with no connection to central management.

The Respondent excepts, contending that the recommended corporatewide order is the culmination of a case-consolidation procedure by which the General Counsel violated the Respondent's right to due process. The Respondent further contends that the judge erred in citing corporate and regional officials' monitoring of labor relations policies in the individual facilities as supporting his single-employer finding and justifying the corporate-wide order. The Respondent argues that the officials' involvement does not disturb the essential autonomy of facility administrators and constitutes simply a beneficent effort to encourage compliance with the law. The Respondent urges that this view of the relationship between corporate officials and individual facilities was embraced by the Second Circuit in *Torrington Extend-A-Care Employee Association. v. NLRB*, supra (denying enforcement of the corporate-wide order in *Beverly I*), and that the court's finding in that regard is binding on the Board in this case. Finally, the Respondent contends that neither Board nor court precedent supports issuance of the corporate-wide order here. For the reasons stated below, we reject the Respondent's contentions, and we adopt the corporate-wide aspect of the judge's recommended Order.

a. The complaint in this case reflects the consolidation of unfair labor practice and representation cases involving 11 of the Respondent's facilities. One of the cases was originally filed in the Board's Region 6. The others were filed in and investigated by other Regional Offices and then referred to Region 6 for consolidation and trial. The Respondent contends that the General Counsel violated its due process rights by "stockpiling" these cases, refusing to accept the Respondent's offers to settle some of them, and consolidating them for trial in the present proceeding. The Respondent contends that this was an unprecedented procedure which violated its right to "substantive due process and equal protection," and it suggests that the General Counsel's only lawful course was to accept settlement offers and try all the unsettled cases seriatim in separate proceedings. We disagree.

First, we reject the Respondent's contention that the General Counsel's decision not to entertain settlements of charges underlying the complaints in this consolidated proceeding violated *Independent Stave Co.,* 287 NLRB 740 (1987), and thereby denied the Respondent "substantive due process." *Independent Stave Co*. sets forth standards which the Board has decided, as a matter of policy, to utilize in exercising its discretion as to whether to give effect to a settlement agreement submitted to the Board for its approval. The decision does not, however, purport to require the General Counsel to apply these criteria in deciding whether or not to accept an offer to settle a charge or complaint prior to hearing.[18] This is because Section 3(d) of the Act gives the General Counsel exclusive and final authority over the issuance and prosecution of unfair labor practice complaints, independent of the Board's supervision and review. As the Supreme Court held in *NLRB v. Food Workers Local 23*, 484 U.S. 112, 126 (1987), the agency has reasonably construed this section of the Act to mean that "until the hearing begins, settlement or dismissal determinations are prosecutorial" and are therefore within the unreviewable discretion of the General Counsel.

Second, with respect to the Respondent's attack on the transfer and consolidation of the cases for trial, we acknowledge that the procedure may fairly be described as "unprecedented," at least given the number of cases and the breadth of the geographic area in which they arose. As one court of appeals has pointed out, however, "novelty alone does not violate due process." *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council,* 897 F.2d 1238, 1244 (2d Cir. 1990). Rather, as the court noted, it must be shown that the action at issue "violated established law or procedures" or that the complaining party "was specifically prejudiced." Id. The Respondent has shown neither.

The General Counsel has broad discretion under the Board regulation cited by the Respondent (29 C.F.R. §102.33) to order charges transferred from one Region to another for consolidation with a proceeding initiated in the latter office. He may do so whenever he "deems it

[18] Under the Board's rules, a "formal settlement"—i.e., a settlement providing for the entry of a remedial Board order—requires the approval of the Board. NLRB Rules and Regulations, Sec. 101.9(b)(1). In addition, once a hearing has begun, any proposed settlement agreement must be submitted for approval either to the administrative law judge, subject to review by the Board, or, if the judge's decision has issued, directly to the Board. Sec. 101.9(d). The General Counsel may, however, enter into an informal settlement agreement at any time prior to the opening of the hearing, and such an agreement is not subject to approval by the Board. Sec. 101.7; Sec. 101.9(b)(2). What the Respondent appears to be objecting to in its exceptions is the General Counsel's failure to enter into such agreements with respect to certain of the complaint allegations in this case.

necessary in order to effectuate the purposes of the Act *or* to avoid unnecessary costs or delay" (emphasis added). While motions for consolidation of cases or for severance of cases that have been consolidated are reviewable by the Board, the consolidation of the cases at issue here did not violate clearly "established law," and all of the cases relied upon by the Respondent are distinguishable, chiefly on the ground that none involved consolidation of cases before trial.[19]

The Respondent has also failed to show that it was "specifically prejudiced" by the procedures complained of. Although it argues in general terms about the difficulty of preserving relevant evidence if cases are not promptly tried, it has not identified in its submission to us the loss of particular evidence or the unavailability of any witness in relation to any violation found against it.[20] Finally, the Respondent cannot reasonably argue that it is prejudiced by the procedure simply because the number and seriousness of the violations found are deemed to support issuance of the corporate-wide order. Whether those violations were established in separate proceedings tried by different Board counsel in different Regional Offices or, as here, established in a single consolidated proceeding, they are still properly relied upon to determine the appropriateness of the order. See, e.g., *NLRB v. Local 3 Electrical Workers (IBEW)*, 730 F.2d 870, 880–881 (2d Cir. 1984) (relying on history of violations, found in separate cases, as justification for order against a union respondent); *J. P. Stevens & Co*., 240 NLRB 33 (1979) (same regarding a respondent employer).

In sum, the General Counsel's procedure for trying these cases did not violate rights of the Respondent under either the United States Constitution or the National Labor Relations Act.

b. The Respondent argues that the judge erred in relying on involvement of corporate officials in labor relations matters at individual facilities. It contends that in *Torrington*, the Second Circuit "expressly found that the violations in Beverly I did not stem from any unlawful corporate-wide labor policy" and that "the presence of divisional personnel in union campaigns at individual facilities appears to have had a positive effect and Beverly should not be punished merely because isolated unfair labor practices occurred when division personnel were present" (quoting *Torrington*, 17 F.3d at 587). The Respondent asserts that this was a factual finding that is binding on the Board in subsequent cases involving Beverly. Although the Respondent does not use the terms "collateral estoppel" or "issue preclusion," its citation of *Del Mar Avionics, Inc. v. Quinton Instrument Co*., 836 F.2d 1320 (Fed. Cir. 1987), suggests that this is the essence of its argument.

We acknowledge that "the doctrine of mutual defensive collateral estoppel is applicable against the Government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts." *United States v. Stauffer Chemical Co.,* 464 U.S. 165, 169 (1984). We do not agree, however, that the Second Circuit's factual findings in *Torrington,* with respect to the corporate-wide order in Beverly I, decided a legal issue that is raised in this case on "virtually identical facts." The fact that the court viewed the role of regional or divisional officials as insignificant even if "isolated unfair labor practices occurred" when they were present does not foreclose a different finding if the record, as here, shows a continuing pattern of unfair labor practices thereafter.

In *Beverly I,* the Board found that the Respondent had committed unfair labor practices at 33 facilities within a 12-state area. During 1988 (the year during which some of the later violations litigated in *Beverly I* were committed) and in four subsequent years, the Respondent continued to violate the Act in facilities where a union represented its employees or in which a union sought to organize its employees. In *Beverly II*, we have found that the Respondent committed an additional 78 violations at 17 facilities in 9 states. (This included repeat violations in 4 facilities that had been involved in *Beverly I* and violations at 13 additional facilities.) In this case (*Beverly III*), we have found that the Respondent committed approximately 28 violations at 9 facilities in 6 states. The violations found in the three cases total approximately 240; they were committed at 54 different facilities in 18 states; and they include a number of differing types of coercive conduct within the meaning of Section 8(a)(1), as well as violations of Section 8(a)(3) and 8(a)(5).

Furthermore, the involvement of divisional or regional personnel[21] in unfair labor practices has continued since the period covered by *Beverly I.* Regional personnel were involved in the commission of more than a dozen

[19] In both *Accent Maintenance Corp.,* 303 NLRB 294, 299–300 (1991), and *United States Postal Service*, 263 NLRB 357, 366–367 (1982), administrative law judges denied motions by the General Counsel to consolidate one or more new unfair labor practice cases with another case in which the hearing had already been held. The fact that the cases involved differing issues of law and fact was only one of the factors cited by the judges. In *Venture Packaging, Inc*., 290 NLRB 1237 (1988), the General Counsel moved to consolidate new cases with a case that not only had already been tried but was in fact pending before the Board. Citing avoidance of delay, the Board issued its decision in the pending case before deciding the other cases. Similarly, in *Jessie Beck's Riverside Hotel*, 231 NLRB 907, 908–909 (1977), enfd. 590 F.2d 290 (9th Cir. 1978), the Board denied a respondent's motion to consolidate a case in which the complaint had just been issued (and in which a trial would be necessary) with a case pending before the Board on summary judgment.

[20] In arguing this point in its brief, the Respondent's sole record citation is to an exhibit which charts the total amount of employee turnover at all of its facilities for each of the years from 1990 through 1992.

[21] At the time of the events in *Beverly I*, the Respondent was organized into divisions. Subsequently it changed its structure into one organized into regions.

unfair labor practices in *Beverly II* and *Beverly III*. Among these were several 8(a)(3) violations and the threat to sell the East Moline facility which, as discussed above, we have found to violate Section 8(a)(1). Also, in *Beverly III*, there was corporate involvement in the unlawful suspension of employee Schriner and the related 8(a)(1) threat of suspension at Northcrest Nursing Home. These findings support the ultimate conclusion that the Respondent exercises substantial control over labor relations policies and practices at the facility level.

Evidence of middle-level and upper-level managers' intermittent involvement in unfair labor practices is not, however, the only evidence supporting the finding of actual corporate control of labor relations in the individual facilities. Labor relations at those facilities was under the direction and control of a regional director for human resources in each separate region. Whenever a union conducted an organizing campaign at a facility, human resources personnel were dispatched to conduct the Respondent's antiunion campaign and assumed substantial control of many of the facility's actions during the critical period. Where a facility was already organized, the same regional personnel had the responsibility for conducting negotiations, executing labor agreements, and handling grievances beyond the preliminary steps. The cumulative effect of these and other findings in *Beverly II* and *Beverly III* significantly differentiates the record on which we issue the present order from the record of the case in which the court of appeals declined to enforce a corporate-wide order.

c. Finally, we reject the Respondent's contention that our order here is contrary to Board precedent. The Board has always recognized that it has the authority to issue employer-wide orders against a recidivist with a record of unfair labor practices in more than one facility and it has done so in appropriate cases, for example, in *J. P. Stevens & Co.,* 244 NLRB 407 (1979), enfd. 668 F.2d 767 (4th Cir.), petition for cert. granted and remanded for reconsideration on other grounds, 456 U.S. 924 (1982), and in *Jack LaLanne Management Corp*., 218 NLRB 900 (1975), enfd. 539 F.2d 292 (2d Cir. 1976). That it has not done so in every possible situation is of no significance. The procession of violations in facility after facility of the Respondent's operations and the continuing involvement of officials above the facility level in labor relations, as discussed above, warrants a remedial approach that is something other than business as usual.

d. In sum, in finding that a corporate-wide order is warranted on the basis of the record of violations committed during the total period covered by *Beverly I, Beverly II,* and *Beverly III,* we are not ignoring Board precedent or, as the Respondent contends, "looking for ways to nullify" the court's findings in *Beverly I*. Rather, we are approaching the remedial issue on a full record different from that confronting the court of appeals in *Beverly I.* Nor are we rejecting the court's observation that the Respondent has the right under Section 8(c) of the Act to oppose unionization of its employees and to have a corporate policy reflecting that goal. It is indisputable, however, that the lawfulness of such a general policy does not insulate an employer from findings that, in attempting to achieve its goal, it has regularly engaged in brinksmanship at the expense of its employees' Section 7 rights and frequently stepped over the line into the commission of unfair labor practices. In our view, the record supports such findings here, and a broad order with corporate-wide application is accordingly warranted.

ORDER

The National Labor Relations Board orders that the Respondent, Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Regions, wholly-owned subsidiaries and individual facilities, and each of them, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing wage increases timed to deter union organizing campaigns.

(b) Failing and refusing to meet and bargain with union representatives concerning grievances and bypassing the certified collective-bargaining representatives of its employees and dealing directly with represented employees.

(c) Making threats to licensed practical nurses of loss of their licenses and jobs if they participate in union activities.

(d) Threatening employees with unfavorable employment references if they participate in union activities.

(e) Coercing employees by assisting them in the retrieval of their union cards in conjunction with the issuance of threats.

(f) Interrogating employees by asking them to raise their hands and move to one side of the room in an employer mandated meeting, thus requiring them to publicly assert their union sentiments.

(g) Creating the impression of surveillance by telling employees that it knows of a union meeting scheduled and the time and place thereof.

(h) Interrogating its employees concerning their union sentiments by soliciting their signatures on an antiunion petition.

(i) Interrogating employees concerning union activities of other employees.

(j) Threatening employees that it would sell a facility before it would see it become unionized.

(k) Threatening to call the police against off-duty employees who handbill in support of a union at entrances to its facilities.

(l) Interrogating employees concerning who had started a union organizational campaign and to determine the union sympathies of the employees.

(m) Engaging in disparate enforcement of its no-solicitation and bulletin board policies between prounion and antiunion supporters among its employees.

(n) Posting guards at mandatory employer meetings.

(o) Requiring off-duty employees to produce identification on the day of a representation election.

(p) Implementing changes in break schedules without bargaining those changes with the Union.

(q) Failing and refusing to furnish the designated collective-bargaining representative with copies of disciplinary warnings issued to represented employees.

(r) Failing and refusing to furnish the collective-bargaining representative with the attendance and attendance-related records of nonunit employees upon the representative's request for them for comparison for processing of grievances of discipline issued to unit members for tardiness.

(s) Creating the impression of surveillance of union meetings and interrogating employees concerning how many employees were at the meeting.

(t) Threatening employees they will get into trouble for discussing unions and threatening discipline for talking about unions on the clock or on the Respondent's premises.

(u) Issuing threats of layoff if a union wins an election at its facility.

(v) Promoting the formation of an independent union.

(w) Engaging in disparate enforcement of prohibitions on campaigning and prohibiting prounion solicitation while permitting antiunion campaigning and solicitation.

(x) Delaying an approved wage increase and placing the blame on the election and the union for the delay and thereafter hurriedly implementing the wage increase the day after the election.

(y) Interrogating employees concerning their union sympathies and soliciting them to sign an antiunion petition.

(z) Prohibiting its employees from wearing union pins while permitting wearing of other types of pins.

(aa) Threatening and suspending and issuing final warnings to employees because of their engagement in union activities.

(bb) Creating the impression of surveillance by indicating knowledge of an employee's union activities.

(cc) Engaging in verbal harassment of an employee because the employee engaged in union activities.

(dd) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Immediately rescind the suspension and final warning issued to Julie Schriner and make her whole for any loss of earnings and other benefits, with interest, suffered as a result of her unlawful suspension. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline issued to Schriner, and within 3 days thereafter notify her in writing that this has been done and that the unlawful discipline will not be used as a basis for future personnel actions against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) On request, furnish to the applicable unions information that is relevant and necessary to their role as exclusive bargaining representative of the unit employees.

(e) On request, meet with and bargain with designated collective-bargaining representatives in the processing of grievances.

(f) Make whole employees from whom a wage increase was unlawfully withheld for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay is to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970) and with interest computed as set forth in *New Horizons for the Retarded*, supra.

(g) Within 14 days after service by the Region, post at all of its facilities copies of the attached notice marked Appendix.[22] Copies of the notice on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 10, 1991.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the elections in Cases 6–RC–10752 (formerly 33–RC–3724), and 6–RC–11201 (formerly 8–RC–14773) are set aside and that these cases

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are remanded to the Regional Director for Region 6 to conduct new elections when he deems the circumstances permit the free choice of bargaining representatives.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT announce wage increases timed to deter union organizing campaigns.

WE WILL NOT fail and refuse to recognize and to meet and bargain with designated collective-bargaining representatives concerning grievances and will not bypass the collective-bargaining representatives of our employees and will not deal directly with represented employees.

WE WILL NOT make threats to licensed practical nurses of loss of their licenses and jobs if they participate in union activities.

WE WILL NOT threaten employees with unfavorable employment references if they participate in union activities.

WE WILL NOT coerce employees by assisting them in the retrieval of their union cards in conjunction with the issuance of threats.

WE WILL NOT interrogate employees by asking them to raise their hands and move to one side of the room in an employer mandated meeting, thus requiring them to publicly assert their union sentiments.

WE WILL NOT create the impression of surveillance by telling employees that we know of a scheduled union meeting and the time and place thereof.

WE WILL NOT interrogate our employees concerning their union sentiments by soliciting their signatures on an antiunion petition.

WE WILL NOT interrogate employees concerning union activities of other employees.

WE WILL NOT threaten employees that we will sell a facility before we see it become unionized.

WE WILL NOT threaten to call the police against off-duty employees who handbill in support of a union at entrances to our facilities.

WE WILL NOT interrogate employees concerning who had started a union organizational campaign and to determine the union sympathies of our employees.

WE WILL NOT engage in disparate enforcement of our no-solicitation and bulletin board policies between prounion and antiunion supporters among our employees.

WE WILL NOT post guards at mandatory employer meetings.

WE WILL NOT require off-duty employees to produce identification on the day of a representation election.

WE WILL NOT implement changes in break schedules without bargaining those changes with the designated collective-bargaining representative of the affected employees.

WE WILL NOT fail and refuse to furnish the designated collective-bargaining representative with copies of disciplinary warnings issued to represented employees.

WE WILL NOT fail and refuse to furnish the designated collective-bargaining representative with the attendance and attendance related records of nonunit employees upon request by the collective-bargaining representative for them for comparison for processing of grievances of discipline issued to unit members for tardiness.

WE WILL NOT create the impression of surveillance of union meetings and interrogate employees concerning how many employees were at the meeting.

WE WILL NOT threaten employees they will get in trouble for discussing unions and will not threaten discipline for talking about unions on the clock or on our premises.

WE WILL NOT issue threats of layoff if unions win elections at our facilities.

WE WILL NOT promote the formation of independent unions.

WE WILL NOT engage in disparate enforcement of prohibitions on campaigning and will not prohibit prounion solicitation while permitting antiunion solicitation.

WE WILL NOT delay an approved wage increase and place the blame on an upcoming election and unions for the delay and thereafter hurriedly implement a wage increase the day after the election.

WE WILL NOT interrogate our employees concerning their union sympathies and solicit them to sign an antiunion petition.

WE WILL NOT prohibit our employees from wearing union pins while permitting the wearing of other types of pins.

WE WILL NOT threaten and suspend and issue final warnings to employees because of their engagement in union activities.

WE WILL NOT create the impression of surveillance by indicating knowledge of our employees' union activities.

WE WILL NOT engage in verbal harassment of employees because they engage in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7.

WE WILL immediately rescind the suspension and final warning issued to Julie Schriner and WE WILL make her whole for any loss of earnings and other benefits, with interest, suffered as a result of our unlawful suspension of her.

WE WILL, within 14 days from the date of the Board's Order, expunge from our files any reference to the suspension of and final warning to Julie Schriner, and WE

WILL, within 3 days therafter, notify her in writing that this has been done and that evidence of the suspension and warning will not be used against her in any way.

WE WILL, on request, furnish to the applicable unions information that is relevant and necessary to their role as exclusive bargaining representative of the unit employees.

WE WILL, on request, bargain in good faith with designated collective-bargaining representatives in the processing of grievances.

WE WILL make whole employees from whom a wage increase was unlawfully withheld for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest.

BEVERLY CALIFORNIA CORPORATION F/K/A BEVERLY ENTERPRISES, ITS OPERATING DIVISIONS, REGIONS, WHOLLY OWNED SUBSIDIARIES, AND INDIVIDUAL FACILITIES AND EACH OF THEM

Kim Siegert and *Joanne Dempler, Esqs., Beth Vorro* and *Scott Burson, Esqs., E. Walter Bowman, Esq*., *Valerie L. Ortigue, Esq*., *Linda McCormick, Esq., Caryn L. Fine, Esq., Susan Pease Langford, Esq., Mark F. Neubecker, Esq., Michael Marcionese, Esq., Stephen C. Bensinger* and *Maria Anastas, Esqs., Ursula L. Haerter, Esq*., for the General Counsel.

Warren M. Davison, Thomas P. Dowd, and *Gail D. Allen, Esqs. (Littler, Mendelson, Fastiff & Tichy),* of Baltimore, Maryland. *Michael R. Flaherty, Keith R. Jewell,* and *Ellen Weitz, Esqs.,* of Fort Smith, Arkansas. *Janet L. Janusch, Esq.,* of Peoria, Illinois, for the Respondent.

Renee L. Bowser, Esq., of Washington, D.C., for United Food and Commercial Workers International Union, AFL–CIO, CLC (UFCW). *Diana Ceresi, Esq.,* of Washington, D.C., for Service Employees International Union Local 285. *Alice Bush,* President and Organizer, of Gary, Indiana, for District 1199 Indiana/Iowa Union of Hospital and Health Care Employees, SEIU, AFL–CIO, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case (*Beverly III*) was heard before me on a number of hearing days commencing on November 30, 1993, and concluding on April 27, 1994, and involves numerous allegations of unfair labor practice violations of the National Labor Relations Act (the Act) at 11 nursing homes in several different States, all of which were owned and operated by Beverly California Corporation, formerly known as Beverly Enterprises (Beverly). In addition there are objections to elections pending based on alleged unfair labor practices and other events. This case is the third consolidated case of numerous unfair labor practices charges issued by the National Labor Relations Board (the Board) against Beverly. In *Beverly I* Administrative Law Judge Martin J. Linsky found numerous violations at various facilities of Beverly and recommended a broad corporatewide order and notice to be posted at all of the Respondent's facilities. This Decision and Order was affirmed by the Board.[1] However on appeal the Circuit Court of Appeals for the Second Circuit declined to enforce the extraordinary, corporatewide notice and order. *Torrington Extend-A-Care Employee Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994). In *Beverly Enterprises*, 316 NLRB 888 (1995), the Board accepted the court's remand and found that a broad cease-and-desist order was warranted at only certain but not all of Respondent's facilities. In *Beverly II,*[2] Administrative Law Judge Peter E. Donnelly found a number of violations and also recommended a corporatewide order and notice in his decision issued on June 29, 1994, which decision is under appeal to the Board by Respondent. In *Beverly I* the Respondent admitted single-employer status which formed in part the basis for the corporatewide remedy issued in that case. In *Beverly II* the Respondent denied single-employer status and asserted the impropriety of a corporatewide remedy. Both issues were fully litigated at that hearing and Judge Donnelly found single-employer status and also recommended a broad corporatewide remedy, which finding and recommended remedy is also under appeal to the Board by Respondent. At the parties' request I took notice of and received the testimony and exhibits in *Beverly II* concerning the single-employer issue for purposes of deciding this issue in *Beverly III*. I also took additional testimony and received exhibits in *Beverly III* concerning this issue. At the time of the hearing in *Beverly III*, Respondent owned and operated approximately 895 nursing homes throughout the United States. The Respondent admits its status as an employer within the meaning of Section 2(6) and (7) of the National Labor Relations Act (the Act) and does not contest Board jurisdiction. Its corporate headquarters is now located in Fort Smith, Arkansas. Respondent also admits the status of the various unions involved in these cases as labor organizations within the meaning of Section 2(5) of the Act.

Briefly, Respondent's organization is set up as follows: The corporate headquarters is now in Fort Smith, Arkansas. There are several regions throughout much of the country. The regions are divided into areas and within each area are several nursing homes. The nursing homes are headed by an administrator who may or may not be a lay person as opposed to a medical professional. Following the administrator, the director of nursing (D.O.N.) is usually second in command followed by an assistant director of nursing (A.D.O.N.), both of whom are either licensed registered nurses (RNs) or licensed practical nurses (LPNs). Additionally "charge nurses" may or may not supervise registered nurses, licensed practical nurses, and certified nurses aides (CNAs) who are directly involved with patient care. In addition there is usually a dietary department, a laundry, and a maintenance department, each headed by a supervisor. The testimony and evidence concerning the alleged unfair labor practices were at separate hearings near the facility involved or the nearest Regional Office of the Board. Additionally testimony was taken and exhibits presented at some of the facility hearings involved as the case progressed concerning the single-employer issue and the recommended remedy involved.

Based on the evidence presented at the hearing, including testimony and exhibits, and after review of the posthearing briefs presented by the parties, I make the following

[1] *Beverly California Corp.*, 310 NLRB 222 (1993).
[2] *Beverly California Corp.,* 326 NLRB No. 29 (1998).

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The Single-Employer Issue

The complaint alleges that Respondent is a single employer within the meaning of the Act. As fully detailed at the hearing in *Beverly II* which transcripts and exhibits were made a part of the record in *Beverly III* and in *Beverly III* the General Counsel contends that this single-employer status includes Respondent's central corporate headquarters in Fort Smith, Arkansas, and its various operating divisions and regions and areas and each of its individual facilities.

Initially, the Respondent admitted single-employer status in *Beverly I* wherein that status was relied on as an essential element in determining that a corporatewide remedy should be imposed. In *Beverly II* the single-employer issue was litigated and Administrative Law Judge Peter Donnelly in that case found single-employer status to attach to Respondent and imposed a corporatewide remedy in his recommended Decision and Order which has not yet been ruled on by the National Labor Relations Board (the Board). Although I have reviewed the recommended decision of Judge Donnelly in *Beverly II*, I do not rely on it in this decision in view of its pending status before the Board. I do however rely on the evidence presented in *Beverly II* with respect to the single-employer issue as well as that presented in *Beverly III*. As the General Counsels point out in their briefs there has been little fundamental change in the operation of Respondent and its various operating divisions, regions, areas, and its individual nursing home facilities as they existed at the time of the alleged violations in both cases.

Initially, I find that the admission of Respondent in *Beverly I* that it was a single employer at the time of the alleged violations in that case weighs heavily against Respondent's subsequent denials of single-employer status in *Beverly II* and *III* and I rely on that admission. Although the record in these cases discloses a change in corporate structure and a move of Respondent's corporate offices from California in *Beverly I* to Fort Smith, Arkansas, in *Beverly II*, this change does not serve to obviate the status of single employer of Respondent in *Beverly I* to a different status in *Beverly II* or *III* upon my review of the evidence concerning single-employer status in *Beverly II* and *III*. Rather I find the evidence presented in *Beverly II* and *III* concerning single-employer status overwhelmingly demonstrates that Respondent is a single employer within the meaning of the Act.

As set out by the Supreme Court of the United States in *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc*., 380 U.S. 255, 256 (1965), four elements are used to determine whether two or more employers constitute a single employer within the meaning of the Act. They are (1) common ownership or financial control; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. In the instant case Respondent concedes that its corporate offices, regional offices, and individual facilities are affiliated business enterprises with common offices, ownership, and board of directors. It also concedes that the operation of its corporate offices, regions, and areas and individual facilities are interrelated. However, it denies the single-employer allegation on the grounds that Respondent's corporate or regional offices do not have substantial control over the day-to-day labor relations decisions made at the level of its individual facilities.

In addition to the concessions made by Respondent concerning the elements other than labor relations, the record developed in *Beverly II* and *III* overwhelmingly demonstrates these elements of single-employer status. Thus the records show that Respondent is organized in a hierarchical fashion with the ultimate responsibility for its management resting in its chairman of the board and chief executive officer (CEO), David Banks, who is located at its corporate headquarters in Fort Smith, Arkansas, and with its board of directors. Management authority flows directly from CEO Banks to Executive Vice President for Operations Boyd Hendrickson. In addition to the elements of common ownership and control the evidence overwhelmingly demonstrates the interrelation of Respondent's operations throughout its organization from CEO Banks to the individual facilities throughout the organization. Thus authority flows from the corporate offices to the regional offices and from the corporate and regional offices to the individual facilities. This is true of Respondent's organization, operations, budget process, human resources, various benefits programs, Respondent's quality assurance program, and nursing and marketing areas as well. While various decisions are made at the individual facility level by facility administrators, facility directors and assistant directors of nursing, and other facility departmental supervisors, their authority is limited by the overall corporate standards and regional input and programs and directives as set out in various manuals, training programs, and the like as well as correspondence and direct telephonic and in person contacts by corporate and regional officials.

Thus it is solely in the area of human resources (a/k/a associate resources) that Respondent contends that Respondent is not a single employer. However the record discloses that authority flows from the corporate department of human resources formerly headed by Vice President of Resources Carol Johansen and now with the labor relations function of human resources transferred from Johansen to Donald Dotson (former Chairman of the National Labor Relations Board) as of August 1993, as Dotson is currently vice president of labor relations. Thus, through corporate resources and now labor relations, the Respondent oversees the labor relations functions and sets the standards for its regional operating divisions and its human resources departments to adhere to and to see that its area managers and individual facilities adhere to it. Thus at the facility level the preliminary first and second steps of the grievance procedures are handled by supervisors and the administration of the facility in those facilities which are covered by a union contract and the regional department of human resources handles the later steps of the grievance procedure with help from the corporate division of human resources and with corporate counsel as required. The regional departments of human resources engage in collective bargaining on behalf of the individual facilities with unions representing employees at those facilities. Whenever it is discovered that a union has initiated a campaign to organize one of Respondent's nonunion facilities, a regional human resources representative is immediately dispatched to the facility where he or she handles the campaign to defeat the union organizational effort by Respondent and the representative reviews and approves all discipline of employees at the facility prior to its issuance during the course of the union campaign. Under all of these circumstances and the record as a

whole Respondent's argument that the individual facilities operate independently must fail. Rather Respondent openly promotes its policy of maintaining a union-free environment at each of its facilities and this policy is disseminated throughout its organization down to the individual facility. Respondent's argument that its overall corporate management is oblivious to individual actions taken by its facilities administration, area managers and regional human resources representatives and operating divisions, clearly has no merit as it ignores the obvious truth that Respondent is in full control of its human resources and labor relations policies as carried out by its individual facilities as the standards, directing lines of authority and overall policies have been disseminated to its individual facilities which are to follow through on them.

II. THE LABOR ORGANIZATIONS

The various unions at the facilities involved in this proceeding are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. William Penn Nursing Center Located in Lewistown, Pennsylvania 6–CA–24221

Statement of the Case

The charge in this case was filed by District 1199P. National Union of Hospital and Health Care Employees, SEIU, AFL–CIO, CLC, (District 1199P or the Union) on January 15, 1992, and alleges that Respondent violated Section 8(a)(1) of the Act by Kenneth Horvath, its facility administrator, engaging in verbal harassment against an employee because of her union activities and that on the same date Respondent violated Section 8(a)(1) and (3) of the Act at this facility by granting a wage increase to all of its registered nurses and licensed practical nurses because these employees joined and assisted District 1199P and engaged in union and concerted activities and to discourage employees from engaging in these activities. The complaint as amended at the hearing also alleges that Respondent violated Section 8(a)(1) by creating the impression of surveillance by Respondent of the union activities of its employees. The Respondent by its answer, as amended at the hearing, denies the violations of the Act.

Facts[3]

Paulette (Polly) Black testified as follows: She has been employed as a licensed practical nurse (LPN) by Respondent at the William Penn Nursing Center since July 1988. In December 1991, she discussed problems at work with several other nurses and discussed having a meeting at her home to discuss these problems. One of the other employees gave her the telephone number of District 1199P and she contacted the Union's representative, Fran Campo, in either December 1991 or early January 1992. Campo met with Black and two other employees several days later at Black's home. Campo later called Black and advised that Union Representative Sue Johnson would get in touch with her. Subsequently, Black solicited union authorization cards and discussed the formation of a union with other employees during breaks and lunch periods and attended union meetings and made home visits to other employees with Johnson. On the evening of January 14, 1992, Black and Union Representative Johnson visited the home of LPN Susie Colpetzer who refused to permit them to come in her home to discuss the formation of a union. The next morning (January 15) at between 10 and 10:30 a.m. the nursing home administrator, Kenneth Horvath, approached Black with flared nostrils while yanking at his dress shirt cuff, and said "Good morning Mrs. Black, I understand you had a busy night last night." At that moment she did not know what he was talking about. Horvath repeated his statement and she then realized that he was talking about her home visit to employee Susie Colpetzer who had refused to permit her and Johnson to come in to her home and discuss the Union. Horvath normally referred to Black by her nickname "Polly." Horvath then told Black he would like to meet with her in his office later that day. Later that afternoon she was called into a meeting with other nurses who were all told by Horvath that they would receive a 50-cent-per-hour raise and that probationary employees would receive a 25-cent-per-hour raise. On that same day shortly before the end of her shift, Director of Nursing (D.O.N.) Beth Byler called her into a meeting with Horvath. At that meeting Horvath referred to an earlier incident which had occurred on January 8, 1992, wherein Black had approached Area Manager Don Black (no relation to Paulette Black) who was visiting the facility and told him of her dissatisfaction with a recent change in procedure for the distribution of medicine. She had not previously taken the matter up with anyone at the nursing home and Area Manager Don Black suggested she do so. At the meeting on January 15, 1992, with Horvath and Byler, Horvath told her she should have taken the matter of her dissatisfaction up with her supervisor at the nursing home and she agreed. Horvath also told her she had hung her head down when greeted by him in the hall which negative demeanor could be picked up on by the residents and she agreed that it could. Additionally, Horvath told her he had complaints from doctors concerning her attitude. She was unaware of any problems with her conduct in the presence of doctors treating residents. She had never previously been called into Horvath's office individually and counseled concerning her job performance.

D.O.N. Byler testified that Paulette Black had previously approached her on January 8, 1992, and told her of the complaint she had made to Area Manager Don Black and that she had told Paulette Black that she should not have gone directly to Don Black, but should have followed the chain of command and gone to her or the administrator first to allow them to attempt to resolve the matter and Paulette Black agreed. A day later Horvath told Byler that the incident should be taken up with Paulette Black and Byler told him she had already discussed it with Black. Byler testified at the hearing that she believed the incident to have been resolved.

Horvath testified he had heard of the complaint having been made to Area Manager Don Black by Paulette Black from Beth Byler. Horvath testified he considered his late afternoon meeting with Paulette Black to be a "stern counseling." Horvath testified and acknowledged that he had made the comment about Paulette Black having had a busy night as he had learned from Colpetzer that morning that Paulette Black and the union organizer had gone to Colpetzer's home to solicit her support for the Union. He considered his remark a sarcastic one, but testified he did not intend to intimidate Paulette Black. Horvath testified further that he had previously expressed to management his concern that the nurses' pay was too low to be competitive in the local area and that with the addition of a new

[3] The General Counsel's unopposed motion to correct the transcript is granted and certain errors have been noted and corrected.

nursing facility recently established nearby, that competition for nurses would increase. Additionally the nurses had not had an across-the-board pay increase and had only received merit increases on their anniversary date in over a year, whereas the certified nursing assistants (CNAs) and other service personnel who were represented by a union (Local 1099P) had recently received an annual contractually specified wage increase thus narrowing the wage differential between the nurses and the CNAs pay. He had discussed this with his supervisor (Area Manager Don Black) and urged an increase in pay for the nurses and had received word of the approval for the increase shortly prior to January 15 when he announced the increase to the nurses on that afternoon. A written notice of the increase was posted on January 16.

Horvath who was terminated by Respondent in late January 1992, and who was called as a 611c witness by the General Counsel testified regarding the raise granted in January 1992, that he had become concerned about the narrowing of the wage differential between the LPNs who were unrepresented and the CNAs who were represented by Local 1199P. He made a verbal request of area manager Don Black about a month before it was granted. He testified he did not have any further conversations with area manager Black between the time he made the request for the wage increase and the time it was granted. He recalls being told by someone that the wage increase had been granted but does not recall who informed him of this. He also does not have any specific recollection of how the licensed personnel were notified of the increase. He may have suggested a figure to Area Manager Black but does not remember doing so. On January 18, Colpetzer told him of the home visit by Paulette Black and the Local 1199P organizer and confirmed his suspicions that there was a union ongoing campaign underway. Upon talking to Colpetzer he went back into his office and called Area Manager Black that same day. On examination by Respondent's counsel, Horvath testified he did not recall if Human Resource Representative Ray Martinez was at the home on the day he received the telephone call advising him that the raise for the nurses had been approved. He has no recollection of a meeting with a group of LPNs and one of the charge RNs to inform them of the wage increase on January 15, but does not deny that he did so. On January 16 he issued a memo to the nurses advising them of the raise and which memo states that he received approval for the raise on January 13.

Human Resources Representative Ray Martinez who had labor relations responsibility for the William Penn Nursing Center in 1991 and 1992 testified that in October 1991 he had a regular scheduled visit at that facility and one of the items Horvath wanted to discuss with him was the wage rates of the LPNs. He told Horvath that he could get a wage survey and go to Area Manager Black and seek an immediate raise over budget or he could propose the wage increase in his upcoming budget for the next year which was to be proposed by the home at about this time. Horvath indicated he would propose the raise for the following calendar year. Between October 1991 and January 1992 there was no action taken or meetings held, to his (Martinez) knowledge, to increase the wages of the licensed personnel (the nurses). Martinez was at the facility on January 13 to handle five grievances that were scheduled with Local 1199P which union represented the service and maintenance employees. He was in the office when Horvath received a call from Area Manager Black and when Horvath got off the phone, he told Martinez that the wage increase was approved. Horvath asked Martinez what he would recommend concerning the effective date of the raises as there was a meeting scheduled for January 30 with the nurses. Martinez said "why would you want to wait when you have got the approval to do the wage increase and make it effective as soon as possible." Martinez testified that at that time (January 13) he was unaware of any union activity among the licensed personnel and that he initially learned of this on January 17 when he received a telephone call from Horvath stating that he had received a letter from Local 1199P that it was attempting to organize the LPNs. Neither Horvath nor Area Manager Black reported to Martinez that Colpetzer had advised Horvath that Local 1199P was attempting to organize the nurses at the facility and this failure to do so was in contradiction of company policy.

Horvath testified he had some concern that there was an organizing effort underway among the nurses in December as he had heard from other employees (social workers) at a nearby hospital which refers patients to the nursing home that 1099P was organizing nursing homes in the area and that he had also noted on several occasions that nurses who were carrying on conversations, terminated the conversations when he approached. He testified he reported his suspicions to Area Manager Black who told him to keep him informed concerning them. Area Manager Black was not called to testify. Horvath testified, however, that it was not until January 15 when Colpetzer told him of the visit by Paulette Black and a union organizer to her home, that he became certain that an organizing effort was underway. He testified he informed Area Manager Black of this either that morning or afternoon of the same day he learned of it from Colpetzer. On January 17, Local 1199P made a demand for recognition to represent the licensed practical nurses and presented him with a letter demanding recognition which was given to him by a union organizer and a group of nurses in his office. After they left his office he faxed the letter to Area Manager Black.

Local 1099P's demand for recognition was rejected by Respondent and on January 21, 1992, the Union filed a petition for certification of representative for the licensed practical nurses. On February 10, 1992, the Union and the Employer entered into a stipulated election approved by the Regional Director with the election scheduled for March 12, 1992. On March 10, 1992, the Regional Director canceled the scheduled election after having received a requested withdrawal of the Union's petition.

Analysis

I find that Respondent did not create the impression of surveillance by the comments addressed to Paulette Black by Horvath that she had a busy night the previous evening in reference to her home visit with the union organizer to employee Susie Colpetzer's home. It was obvious to Paulette Black that since Colpetzer had rejected their request to enter her home and discuss the Union that she was not a union supporter and Black testified she realized that this was what Horvath was referring to. Thus, this incident alone does not prove that Horvath or Respondent was either engaged in surveillance or was creating the impression of surveillance, but rather only shows that Horvath was making her aware that he was aware of the visit to Colpetzer's home. I find that this evidence is insufficient to establish that Respondent created the impression of surveillance of Paulette Black's union activities and shall recommend the dismissal of this allegation.

I find that the evidence is sufficient to show that Horvath engaged in verbal harassment of Paulette Black when he called her into his office individually, late on the afternoon of January 15. At this meeting Horvath went through a list of her alleged shortcomings which I find was a direct result of his displeasure with her soliciting employee Colpetzer's support for the Union and that Respondent violated Section 8(a)(1) of the Act thereby.

I find that the evidence concerning the grant of the wage increase on January 15, the same day when Horvath learned of the efforts of Paulette Black to solicit support for the Union is sufficient to establish that the timing of the wage increase was indicative of the Respondent's efforts to stem the union campaign. While a wage increase had been under consideration, the timing of this announcement to the nurses establishes a prima facie case that it was announced on January 15 in an effort to stem the union campaign. I find the knowledge of Horvath of Paulette Black's efforts coupled with his verbal harassment of her are properly to be imputed to the Respondent and I do not credit the testimony of Horvath that the timing was merely coincidental. I thus find that Respondent violated Section 8(a)(1) of the Act by announcement of the granting of the wage increase to the nurses on January 15, in order to stem the union campaign. It should be noted that I credit the testimony of Martinez that the wage increase was approved on January 13, 2 days before the date of the January 15 meeting with the nurses at which it was announced by Horvath and that Martinez urged Horvath to make it effective immediately. Thus, I do not find the granting of the wage increase a violation. However, there was no explanation offered by Respondent as to why the announcement was made on January 15, immediately on the same day that Horvath confirmed there was a union organizing effort underway. I thus find that the announcement on that date was timed to bolster the employer's effort to spurn the union organizational campaign and that Respondent thereby violated Section 8(a)(1) of the Act.

B. Greenwood Health Center Located in Hartford, Connecticut 6–CA–22084–23 (formerly 34–CA–5443)

Statement of the Case

The charge in this case was filed by New England Health Care Employees Union District 1199/SEIU (the Charging Party, District 1199, or the Union) on October 17, 1991. The first amended charge in this case was filed by the Charging Party on December 3, 1991. The complaint alleges, Respondent admits, and I find that the following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and maintenance employees employed by the Employer at its Hartford, Connecticut, facility; but excluding all other employees, office clerical employees, licensed practical nurses, registered nurses, temporary employees, and all guards, professional employees and supervisors as defined in the Act.

The complaint further alleges, Respondent admits, and I find that since about September 30, 1980, and at all material times the Union has been the designated exclusive collective-bargaining representative of the employees in the unit and since that time the Union has been recognized as such by Respondent and this recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from October 16, 1989, to October 15, 1992, and that at all times since 1980 the Union has been the exclusive collective-bargaining representative of the unit.

The complaint alleges that since about September 10, 1991, Respondent has failed and refused to meet and bargain with the Union as required by the grievance procedure set forth in article XXVII, section 1(a), (b), and (c) of the agreement and has thereby violated Section 8(a)(1) and (5) of the Act. The complaint further alleges that from about September 10 to October 10, 1991, Respondent by its Section 2(11) supervisors, Facility Director Pamela Miller, Facility Director of Environmental Services Robert F. Flynn, and Facility Housekeeping Supervisor Elda Allegne, bypassed the Union and dealt directly with the employees in the unit by discussing and resolving grievances with employees which had been filed by the Union pursuant to article XXVI of the agreement and thereby violated Section 8(a)(1) and (5) of the Act. The Respondent has by its answer denied the commission of the aforesaid alleged violations of the Act.

Facts

The collective-bargaining agreement in effect during the period October 16, 1989, through October 15, 1992, contained the following grievance procedure:

> 1. It is the intention of the parties that all complaints, disputes, controversies or grievances arising between the parties hereto, and involving questions of the interpretation or application of this Agreement, shall be adjusted by and between the parties involved in the following manner:
>
> (a) Any Employee and/or his/her Union delegate or representative covered by this Agreement who desires to present a grievance may do so, stating the nature of the grievance and the remedy sought.
>
> (b) Grievances to be considered hereunder must be submitted to the Employee's supervisor within thirty (30) working days after the appearance of the facts or circumstances of the grievance, or the grievance shall be deemed waived or settled.
>
> (c) The decision of the supervisor shall be rendered to the Employee within ten (10) working days from the time the Employee presents the grievance unless the time is mutually extended by both parties.
>
> (d) In the event the grievance is not settled as provided above, the Employee and/or Union delegate or representative may within ten (10) working days from the time the decision is rendered to him/her submit the grievance in writing to the Administrator of the Home. If the Employee fails to process the grievance to this step within the prescribed time limit, the grievance shall be considered waived or settled. The decision of the Administrator shall be rendered within ten (10) working days from the time the Employee presents the grievance.
>
> (e) Saturdays, Sundays and legal holidays shall not be considered working days under this Article.
>
> (f) Failure on the part of the Nursing Home to answer a grievance at any step shall not be deemed acquiescence thereto, and the grievant may proceed to the next step.
>
> (g) Anything to the contrary notwithstanding, a grievance concerning a discharge or suspension may be presented in accordance with Article XXIV.

Louis Saez testified that he was employed in the housekeeping and laundry department of the Greenwood Nursing Home

for approximately 10 years until his termination in June 1993. In September 1991, he became a union delegate with the responsibility for representing employees in his department and filing grievances. Shortly after he became a delegate he and several other employees met with Betty Cleveland, the union "organizer" (the union representative who is employed by the Union and is not an employee of Respondent) who serviced the bargaining unit at the Greenwood Nursing Home. The purpose of the meeting was to discuss the employees' complaints of harassment by Housekeeping Supervisor Elda Allegne and Director of Environmental Services Robert Flynn concerning reprimands by supervisors in public areas of the nursing home and disrespectful treatment of the employees by the supervisors. Cleveland advised Saez to file a grievance concerning these complaints. On September 10, 1991, Saez wrote a grievance and filed it with Flynn. No individual was noted on the grievance as a grievant, but Saez signed it as a delegate. The grievance cited article VI "Respect and Dignity" as the alleged contract violation which is as follows:

> All employees are entitled to be treated with respect and dignity at all times. When there is a need for discussion over issues all parties agree that these discussions will be conducted in a fashion designed to avoid embarrassment or ridicule and will be conducted in a professional manner.

Saez testified that at the time he presented the grievance to Flynn, he asked Flynn to let him know when he could meet so Saez could let the employees know. Saez testified he was not contacted by Flynn as he had requested, but rather began to receive reports from other employees that they had been questioned by Flynn and Allegne in their work areas concerning the grievance. Flynn who was called as a witness acknowledged that he and Allegne had questioned the employees concerning the grievance in order to find out what it was about and admitted that he did not ask Saez as to what it was about although Saez' name was the only name on the grievance. Allegne was not called as a witness. Flynn testified that on September 19, 1991, he held a meeting with the housekeeping, laundry, and maintenance employees at which he discussed the grievance as well as several other matters unrelated to the grievance. Saez was not given any advance notice of the meeting as he testified he had requested, but rather he was called into the meeting as one of several employees on short notice. Flynn denied that Saez had requested to be notified in advance of the meeting. Flynn testified he addressed the subject of "respect and dignity" and told employees that if they have a problem with other employees, they should attempt to resolve it among themselves and to only involve supervisors if they were unable to resolve the problem. Flynn testified he did so as he believed that problems among the employees were the reason for the filing of the grievance based on what he had learned from the questioning of the employees by himself and Allegne. He admitted he had not discussed the basis of the grievance with Saez prior to the meeting and did not in fact know what the grievance was about. Flynn testified he normally discusses grievances with the delegate and the grievant or schedules a meeting to discuss it. Respondent's administrator, Pamela Miller, testified that when grievances are filed with "management, then a union delegate is always involved." Flynn admitted he did not speak to Saez before the meeting and that he did not address Saez as a delegate at that meeting and did not specifically refer to the grievances during the meeting, but rather addressed other unrelated matters at the meeting as an "in service meeting" (an informational or training meeting) such as the results of a quality assurance inspection and accident reporting. He also used the Respondent's "in service" sign-in form to document the attendance of the employees at the meeting although he did not normally utilize this form for grievance meetings. He also admitted he had no prior practice of combining in-service and grievance meetings. He contended that his purpose in questioning employees individually and holding the meeting when he did was to comply with the contract requirement that the grievance be answered within a 10-day period.

Saez testified that he and the employees in the affected departments met again with Cleveland as a result of the lack of response to the grievance. As an outcome of this meeting Saez filed another grievance concerning the respect and dignity clause but this time the grievance was signed by all of the employees in these departments utilizing two grievance forms for the grievances. Saez presented this grievance to Flynn on October 7, 1991, along with delegate Nettie Benyard. Benyard was not called to testify. The grievance requested a meeting with a 30-day notice. Saez testified that at the time of the presentation of the grievance to Flynn, he told him that he was filing this grievance because of the lack of response to the prior grievance. Saez also testified that he asked Flynn to inform him of the meeting time in advance so that a union representative (an "organizer") could attend. Flynn denied that Saez requested such notice. Flynn testified that he brought this grievance to Miller's attention immediately.

Once again Saez was not notified in advance of the meeting, but was instead called without notice into a meeting on October 10 over the public address system along with three other employees in addition to Miller, Flynn, and Allegne although the grievance had been signed by approximately 15 other employees. Miller held up the grievance forms and said she had two grievances filed by Saez and told Saez to tell her what the grievances were about. Saez testified he told her he did not want to discuss the grievances unless the employees involved were present. He testified further that the employees with the most problems were not present at the meeting. Saez testified that when he told Miller he did not want to discuss the grievances unless the involved employees were present, she told him she was not going to pay off-duty employees to attend the meeting and that he needed to speak then or there would be no more meetings. Saez testified he also told Miller he needed a union representative present and asked to notify Cleveland and that Miller told him to "talk now—or you never will." Miller then inquired of the other employees if they had any problems and they were silent. Saez testified that Miller then told the employees, "She said when they have a problem, they should go to the supervisor, not to me."

Miller testified she had copies of the grievance and told the employees in the room that they were meeting in accordance with the grievance procedure to meet within the 10-day timeframe and that because of the limited information provided on the grievance form, they (the management) wanted to "know exactly what their concerns were." She then

> essentially told them that the way I wanted to conduct the meeting was to go around the room and ask each of the specific employees exactly what their concerns were, and shortly after that, Luis [Saez] was seated at the far end of the table, directly across from me. And he said, "I 'm not saying anything without Betty [Cleveland]." And I said, "Luis, you know, you

filed a grievance. You obviously are aware of what some of the concerns are. You know we have an obligation to conduct this meeting within the 10 days. Historically we've not involved a union organizer at this step of the grievance process. And, you know, we would prefer to continue that way. What we'd like to know is what are the concerns of the employees so that we can work on resolving these issues?" And he again said that he wasn't going to say anything.

At this point Miller then went on to the next person, Oscar Reyes, who complained about the housekeeper Allegne having corrected him in a patient care area "because he had failed to put up a Wet Floor sign." She looked at him and the other employees in the room and told them that this was a safety violation and needed to be corrected immediately, but that no disciplinary action would take place in public if it were to happen which it had not. She told them "That was not at all intended to degrade anyone or demoralize. But it was merely a correction of a safety hazard." She then asked the other employees if they agreed that safety violations should be corrected right away to prevent injuries. She then went on to the two other employees present who said nothing. She then reiterated that she was attempting "to resolve the issue and that this was the time to do it." She testified further that union organizers (nonemployee union representatives) have not historically become involved at this stage, but that if an organizer wanted to attend a grievance meeting they would contact her and ask to be present. At one point in the meeting Saez said "that not everybody who had signed the grievance was there." She told him in his role as delegate, he is expected to represent the employees as "not everybody is on every day" and they did not routinely have three or four sets of grievance meetings. She also told the employees at the meeting that if the problems were among the coworkers, then to attempt to resolve them among themselves and if they were not resolved to follow the steps in the contract (grievance procedure). She denied having told the employees not to go to Saez with their problems. She testified that in the past she had honored requests of union representatives to be present at step 1 grievance meetings. The meeting lasted 15 to 20 minutes. After the October 10 meeting Miller received a letter from Cleveland objecting to Miller's treatment of union delegates and stating that the Union was filing an unfair labor practice charge with the Board. The charge in this case was filed on October 17. Subsequently, with its regional human resources representative, Jay Begley, Respondent met with union representatives in December 1991 to discuss the issue of mutual respect and dignity which was the grievance involved in the prior meeting.

Analysis

I find that in each of the two instances the Respondent violated Section 8(a)(1) and (5) of the Act by its failure and refusal to meet with Luis Saez in his role as a delegate in the first meeting conducted by Flynn and subsequently in the second meeting conducted by Miller and its continuation of the second meeting in the face of protests by Saez that Union Organizer Cleveland should be present and that the employees who had filed the grievance were not present. It is clear from this record that the Respondent flagrantly ignored Saez in his role as a union delegate. I credit Saez' testimony as set out above. In both instances Saez was not given advance notice of the meeting but was rather called in on short notice without warning that the meeting was to occur. The first meeting conducted by Flynn was conducted as an in-service meeting rather than a grievance meeting. Saez was not addressed by Flynn as a delegate and Flynn only purported to discuss problems among coworkers with each other which was not the grievance filed by Saez rather than asking Saez as the delegate who had filed the grievance what the grievance was about. Similarly, although Saez had specifically requested notice of the meeting at the time he filed the second grievance signed by 15 employees, so that Cleveland could attend, this request was ignored and Saez was called into the meeting with only three other employees although 15 employees had signed the grievance. Saez' protestations that Union Organizer Cleveland should be present and that the other employees who filed the grievance should be present, were specifically rejected by Miller and the meeting was continued by Miller. The above conduct by Respondent also ignored the Union's right under the grievance procedure for a grievance to be filed by "any employee and/or his/her delegate or representative (nonemployee union organizer)." Such conduct by the Respondent clearly violated Section 8(a)(1) and (5) of the Act.

The Respondent further violated Section 8(a)(1) and (5) of the Act by bypassing the Union and dealing directly with bargaining unit employees with respect to the grievance. After the filing of the first grievance Flynn and Allegne interrogated the employees directly in attempting to find out the subject matter of the grievance rather than dealing with union delegate Saez who had filed the grievance to learn what the grievance was about. This is clearly unlawful direct dealing with the employees and the results of this manifested itself by Flynn addressing at his meeting with employees the subject of working out problems among coworkers with each other which was not the subject matter of the grievance. Similarly Miller's directing the employees at the October 10 meeting to go to their supervisor rather than Saez with problems urged directly dealing in violation of Section 8(a)(1) and (5) of the Act.

C. Deltona Health Care Center Located in Deltona, Florida, 6–CA–22084–24 (formerly 12–CA–14857)

Statement of the Case

The charge in Case 6–CA–22084–24 (formerly 12–CA–14857), was filed by International Brotherhood of Teamsters Local Union No. 385, AFL–CIO on February 3, 1992 (the Charging Party, the Union, or Local 385), and a first amended charge was filed by the Charging Party on March 20, 1992.

The complaint alleges that Respondent by Khrys Kantarze, the Deltona Health Care Center facility administrator at the facility in or about January 1992, interrogated employees about their union membership, activities, and sympathies by soliciting them to sign an antiunion petition and on or about February 5 or 6, 1992, prohibited employees from discussing the Union at any time at Respondent's facility. By the aforesaid conduct engaged in by Kantarze, Respondent is alleged to have violated Section 8(a)(1) of the Act.

The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by the conduct engaged in by its human resources director, Alvin Taylor, at its Deltona facility as follows:

On several dates in or about January 1992, Taylor:

(a) Threatened employees with reprisals, including loss of license, for having supported the Union.

(b) Threatened employees with reprisals including bad employment references, for having supported the Union.

(c) Advised employees that if they were contacted by union representatives away from Respondent's facility they should summon police and press harassment charges.

(d) Threatened employees with unspecified reprisals for discussing the Union with other employees.

(e) Interrogated employees concerning their union activities, by offering to assist them in obtaining the return of their union authorization cards.

(f) Threatened employees that wage increases would be withheld until their union support and activities ceased.

(g) Interrogated employees assembled at a meeting en masse concerning their support of the Union.

(h) Informed employees that support for the Union was futile and that nothing would change if the Union was chosen as their representative.

(i) Issued an overly broad prohibition of solicitation in support of the Union on Respondent's premises at any time.

(j) Created the impression among employees that their union activities were under surveillance by Respondent.

The Respondent denies the commission of the alleged unfair labor practices.

Facts

The complaint alleges several independent violations of Section 8(a)(1) of the Act. In late 1991, the Union commenced an organizational campaign among the nonprofessional employees at this facility. An employee organizing committee was formed which distributed union authorization cards to employees. The Union filed a petition in Case 12–RC–7500 and an election was held on March 5, 1992, in a stipulated unit consisting of nonprofessional employees, including licensed nurses and excluding registered nurses and various other designated categories such as directors, managers, and supervisors as well as clerical and office employees and guards. The Union was rejected by a vote of 16 to 63.

According to the testimony of Alvin J. Taylor, Respondent's director of associate relations for Region 3 which encompasses the State of Florida, he was alerted of problems with management at the Deltona Health Center by a call made to Respondent's "hot line" which is maintained by Respondent for its employees throughout the country to make confidential calls to Respondent's home office in Fort Smith, Arkansas, concerning problems at their individual facilities. Taylor testified his office is in Longwood, Florida, and in early January 4 or 5, 1992, on either a Monday or Tuesday he arrived at the Deltona Health Care Center in response to the "hot line" call. Shortly prior to this he dispatched two associate relations representatives, Khrys Kantarze and Sue Lutes, to the nursing home and they arrived on the Saturday prior to his arrival to investigate alleged problems with management in response to the hot line call. Shortly thereafter on or before January 20, 1992, Area Manager Peter Nyland discharged the administrator who was replaced by Kantarze as administrator on January 20, 1992, and also discharged the director of nursing about that time. Following his arrival Taylor initially held three separate meetings with the facility's department heads, supervisory staff including licensed practical nurses (LPNs) and registered nurses, and with the CNAs to address the problems of which he had been made aware by the "hot line" call. During one of these meetings he learned that there was an ongoing union organizational campaign underway at the facility. In response thereto he and his associate relations representatives, Kantarze and Lutes, maintained a presence at the home until March 5, 1992, when a representation election was held.

Ruth E. Flores, who was employed as a CNA during this period testified concerning four to five meetings held by Respondent's management at which the Union was discussed. Flores was a member of the union organizing committee. She resigned her position as a CNA in January or February 1993. At the meetings attended by Flores, Taylor and Kantarze spoke to the employees. The first meeting Flores attended was on a Monday and Taylor spoke and introduced Kantarze to the employees and told them that if they had any complaints, to talk to him or Kantarze. Taylor did not discuss the Union in this meeting. On Thursday of the same week Taylor held another meeting of the employees and said that he knew that employees had signed union cards with their social security numbers on the cards and if the cards went to the Labor Board, the employees who signed them would be put on a list and would not be able to get a job elsewhere as they would be regarded as troublemakers. Taylor also said that LPNs who signed the cards could lose their license since it was unlawful for them to participate in union matters. According to Flores, at one of the meetings at which Taylor was imploring the employees to give the management a chance in reference to its campaign against the Union, Flores who was standing in the back of the room was summoned by Taylor to come to the front of the room and say "smile" to the other employees three times. She complied with Taylor's direction although she was embarrassed by it and regarded it as "silly." At this meeting Taylor also asked everyone who was willing to give management a "chance" with respect to the union campaign, to raise their hand and move to the side of the room where he was standing. Taylor walked to the side of the room and all of the employees did also. At the second or third meeting held by Taylor, Taylor told the employees to call the police if union organizers came to their homes and tell the police they were being harassed. Taylor also told the employees that they could not discuss the Union at work and did not specify when they could talk about the Union at the facility. With respect to raises Taylor told the employees at the first meeting held on a Monday that the administration was going to check and make evaluations and that if the employees were entitled to a raise, they would get it. At the second meeting Taylor told the employees the administration was not allowed to give employees raises or make any changes in their insurance until the union election process was finished, but did not explain why. Taylor also said that if the Union were selected by the employees, there would be no changes except for the requirement to pay dues as the union would have to talk to the Respondent first. On Thursday, at the second meeting Taylor said he knew there was a union meeting scheduled for the next day and that "they know the time and the place, and he look, when he say that to Ms. Rivera (Vivian Rivera)." Taylor said he knew the place was on Fort Smith Boulevard, in Deltona which was the street on which Vivian Rivera lived and looked at Rivera. In fact there was a union meeting scheduled at Vivian Rivera's house on Fort Smith Boulevard the next day, a Friday.

Flores also testified that at the second or third meeting she attended at the facility, Taylor said that if anyone came to an employee's home on behalf of the Union to call the police and tell them they are being harassed. She also testified that he told

the employees at this meeting that the union supporters were "not supposed to talk about the Union in the facility." He did not indicate when they (the union supporters) could talk about the Union at the facility and did not mention breaktimes or lunchtimes. Flores acknowledged that at these meetings, employees asked questions but did not recall in answer to a question by Respondent's counsel, that the statements made by Taylor concerning union representatives visiting employees' homes were in response to employees' questions but did note that it had been 2 years since these meetings. She also denied on questioning by Respondent's counsel that Taylor had told the employees they could talk about the Union during breaks, lunch, or before and after work but not on working time at the facility.

Vivian Rivera, a former CNA who resigned within a month following the election on March 5, 1992, testified she was a member of the union organizing committee. She attended four meetings held by Respondent between January 15 to March 5, 1992. There were also two union meetings held during this period. The first union meeting was held in her home on Fort Smith Boulevard. On a Thursday at the second of Respondent's meetings Taylor said he was aware of the meeting to be held on Fort Smith Boulevard and looked at her. Taylor also said he was aware of the persons who were on the union committee and the time and the place and names of the employees who were going to be there. Taylor also said "that if any union organizer were to call or go to their home, to call the Sheriff's Department and say that they're being harassed by us." He also said "that if any of the employees were approached at work by us, which is the union committee, to go see him and he'll take further action." At two meetings including the second meeting, Taylor said that anyone who had signed a union card and wanted it back should see him as he was going to post an address where they could get their cards back and that the employees could get in touch with either the Union or the Board. Taylor also told them that if the employees signed a union card and put their social security number on it, "this would follow you throughout your career." Taylor also said that if any of the licensed practical nurses (LPNs) had signed a union card, "they should try and get their cards back because they couldn't participate in any union activities. They could lose their license and get fired." He did not give any reason that LPNs could not participate in union activities. Taylor also said that if the Union were chosen to represent the employees at the election, there would be no changes in benefits, that the only change would be the requirement that the employees pay dues and that any changes would have to be approved by the Respondent. On cross-examination Rivera acknowledged that she had said in her pretrial affidavit that Taylor had said "we could get a bad employment reference because of . . . being involved in union activity" and that from this she had testified that Taylor had said employers wouldn't hire them but conceded that this was merely her conclusion and that Taylor had not said the employees would not be hired.

Rivera further testified that in early February 1992, she received a verbal warning from Kantarze who was then serving as administrator of the facility. Kantarze called her into her office and said she was going to give her a verbal warning because someone had told her that Rivera was among a group of females in the facility who were talking about the Union, "and we were cursing and carrying on," and that "the next time she hear any talk about the Union in the facility that she was going to have to write me up." Kantarze did not say when or where she could discuss the Union, nor did she mention breaktime or lunchtime.

The General Counsel also called Evelyn Ponzella who had formerly been employed at the Deltona Health Care Center for about 6 months as a CNA. She left the employment of the Respondent about a week after the March 5 election. She attended one meeting conducted by Taylor which was held in either the last week of January or the first week in February. This was the third or fourth meeting held by Taylor and was set at 2:30 p.m. to catch two shifts (the day shift 7 a.m. to 3 p.m. and the evening shift 3 p.m. to 11 p.m. and was mandatory. It was attended by about 50 employees. In addition to Taylor, Area Manager Peter Nyland and Kantarze were also present. Taylor did most of the talking and said it was a review of their benefits. She recalls him saying "that he had reviewed the raises that were supposed to be given that we had been waiting for, and that no raises were to be given until after union activity was settled." He did not give any explanation why the raises were being withheld. Taylor also told them that if anyone had signed union cards, their involvement in union activity and their "card would be recorded at the Labor Board, and that it would be placed on a list and if we needed a reference, it would be difficult for us to get a good reference and to obtain another job." Taylor also said that anyone who wanted to retrieve their union card and did not want to be represented by the Union could go to his office or he would post the address of the Labor Board. Taylor also said that if any LPNs "had participated in signing union cards, that it was illegal for them to have participated and that he recommended having them get their cards back. That they would lose their license, and it was possible that they would lose their job." There were LPNs present at this meeting. Deltona General Counsel Exhibit 5 was posted in the employees' lounge and is addressed to all staff from Khrys Kantarze and dated February 11, 1992, and states: "Many of you have asked how you can get your union cards returned. In keeping with my philosophy of keeping you informed on all requests and suggestions, the following are the addresses (of the Union and the Board) that you have requested." Ponzella testified that the foregoing notice was posted during the union activity right after Taylor's speech. Ponzella testified further that there were four employees on the employee organizing committee including herself on behalf of the Union. Several employees came to her and requested their cards back. During Taylor's speech he also said the only change that would occur if the Union were successful would be that the Union would take the employees' dues.

The Respondent called LPN Doris Francis, a 10-year employee who regularly serves as a charge nurse. She testified that she attended all three or four meetings held by Taylor among the nurses and other employees in the unit. She testified LPNs were not specifically discussed in these meetings. LPN licenses were not discussed in the meetings. Employees' social security numbers and references were not discussed by Taylor in these meetings. Taylor made no comments at these meetings regarding employees being contacted at home or in the facility by union representatives, obtaining the return of union cards. Taylor did not comment regarding the status of wage increases. Taylor did not ever ask employees to move toward him at a meeting, or request employees to raise their hands. Taylor did not comment concerning wages, insurance, or benefits levels if the Union were chosen and there was no discussion by Taylor

of negotiations or what would happen if the Union won the election. I do not credit the foregoing testimony of Francis whose testimony indicates a complete absence of the discussion of the above matters, much of which discussion was even acknowledged by Taylor and other witnesses called by the Respondent as well as by the witnesses called by the General Counsel.

The Respondent called Betsy Viduiera who has responsibility for administrative duties such as payroll, receptionist, and accounts payable in the facility personnel department. She did not vote in the election and was not designated as a member of the unit but did attend one meeting held by Taylor in January 1992 which was also attended by CNAs and staff from the housekeeping and dietary departments. Viduiera testified that at the meeting she attended, one of the employees at the meeting expressed concerns about getting contacted at home and Taylor said he could not do anything about it and to handle it as you would any other call at your home. She also testified that employees asked what they should do if they were "harassed or stopped" at the facility and that Taylor told them to say they were working at the time. She testified further that employees brought up concerns about how to obtain the return of their union cards. She testified that at the meeting she attended Taylor made no comments concerning his knowledge of union meetings or members but that an employee brought the subject up and Taylor said everyone had "to do what they have to do."

Additionally Connie Kristene Jarvie Papa was called by the Respondent. She was the housekeeping and laundry supervisor at the facility at the time of this hearing but had been a housekeeping aide and voted in the election held in March 1992. She attended one or two meetings held by Taylor. She recalls a statement by Taylor that if the employees were bothered at home or at the facility by union representatives to let them know you did not want to be bothered. She does not recall any employees asking questions as to how they should respond to contacts by union representatives. She recalls some employees asked about how to obtain the return of their union cards and Taylor mentioned that an address would be posted or they could speak with him if they wanted to. She does not recall any comments by Taylor concerning wage increases. Taylor did not ask employees to move toward him, or to raise their hands. Nor did he ask Ruth Flores to come to the front of the room. She does not recall any discussion of LPNs or their licenses or their union activities. Nor does she know of any comments by Taylor concerning his knowledge of union meetings or the identity of union members.

Analysis

A. Threats to LPNs

I credit the testimony of Ponzella, Flores, and Rivera concerning the threats made to LPNs that they could lose their licenses and their jobs if they participated in union activities. I found the testimony of these witnesses to be straightforward, essentially similar in this regard and credible. I note that although Taylor did not admit having made these threats he admitted having told the LPNs that they could not engage in union activities because he believed them to be supervisors and testified that he was "shocked" when he was told they had signed union cards although after discussion with legal counsel he made the decision to stipulate to the inclusion of the LPNs in the unit and they were permitted to vote in the election. Respondent defends on the ground that Taylor may have made an honest mistake in concluding that LPNs were supervisors and argues in the alternative that they were indeed supervisors based on some limited testimony provided by Charge Nurse Doris Frances concerning her duties and by Kantarze that all LPNs may be required to serve as charge nurses. I find, however, that this evidence is insufficient to establish that the LPNs were supervisors and that this proof of the defense fails also. Moreover, I note the nature of the threats made by Taylor went beyond merely telling them they could not engage in union activities, but extended to threatening them with loss of their licenses and loss of their jobs. In crediting the three employees involved, I note also that they are no longer employed by Respondent and appear to have no stake in the outcome of this proceeding. I found Taylor to be an experienced human resources representative who by his own testimony is second in seniority among the regional directors of human resources in Respondent's corporatewide operation and who is called on heavily by other regions to assist in election campaigns. As such I find him to be a most knowledgeable individual well versed in proper supervisory conduct during union campaigns. However, I note that Taylor did not speak from or follow a written text during his speeches to employees. I also noted as contended by the General Counsel that he was an effective speaker, but who in his zeal to defeat the Union crossed over the line on several occasions when delivering speeches to employees concerning their Section 7 rights to select the Union as their collective-bargaining representation as hereinafter set out. I thus find that Respondent, through its agent, Taylor, violated Section 8(a)(1) of the Act by telling the LPNs that it was illegal for them to participate in union activities and that they could lose their license and possibly their job for doing so.

B. Threats of Bad Employment References

I also credit the testimony of Ponzella, Flores, and Rivera that Taylor told the employees that their signed union cards would be sent to the Labor Board where they would be recorded and would serve as unfavorable employment references to the determent of their future employment opportunities. As the General Counsel contends in his brief these statements were calculated to frighten the less well informed and were violative of Section 8(a)(1) of the Act.

C. Interrogation by Assisting Retrieval of Union Cards

I also find that Respondent violated Section 8(a)(1) of the Act by Taylor's informing employees that he would post the names and addresses where the employees could retrieve their union cards and by the actual posting of this information by Kantarze. Although the furnishing of this information would not of itself provide the basis for a violation of the Act, in this instance following Taylor's misrepresentation and unlawful threats to the LPNs and in the absence of any repudiation of these threats by Taylor, the follow-through with the furnishing of this information was coercive and unlawful interrogation. See *Mariposa Press*, 273 NLRB 528, 529 (1984).

D. Directing Employees to Summon Police if Visited at Home by the Union Representatives

With respect to the statements made by Taylor concerning employees being contacted at home by union representatives, I credit the testimony of Taylor and Kantarze that these comments were in response to an employee question at the meeting as to what she could do about it. I credit Taylor's testimony that he told the employees that Respondent could not do anything

about this but that the employee should treat this in the same manner as she would treat any other instance of being bothered at her home by resort to community services including the police. Although Taylor initially testified concerning this that he had mentioned using community services, he readily acknowledged when referred to his affidavit that he had included reference to the police. I credit the version of these comments by Taylor and Kantarze as corroborated by Viduiera and Papa over the versions of Flores and Rivera. I thus find that Taylor's comments in this regard were not violative of the Act.

E. Threats of Reprisals for Discussing the Union and an Overly Broad No-Solicitation Rule

With respect to alleged threats of reprisals for discussing the Union and an alleged overly broad no-solicitation rule, the General Counsel presented the testimony of Rivera and Flores. Rivera testified that Taylor stated at one of the general employee meetings that "[i]f any of the employees were approached at work" by union committee members, "to go see him and he'll take further action." Flores testified that Taylor stated at a general employee meeting that the union committee members were "not supposed to talk about the Union in the facility." Flores further testified that Taylor did not indicate when the employees could talk about the Union at the facility, nor did he mention breaktime or lunchtime as a time when the Union could be discussed. Rather he said the employees were not "allowed to talk [about the Union] in the facility." The General Counsel contends that these statements by Taylor "constitute both threats of reprisals for discussing the Union and the issuance of an overly broad prohibition on solicitation rule." The Respondent contends that the statements attributed to Taylor by Rivera and Flores should not be credited and, even if credited, are in any event too vague and ambiguous to constitute threats of reprisal or discipline. Rather Respondent contends "Deltona had a lawful no-solicitation policy that was uniformly enforced in a lawful manner." "If members of the Union's organizing committee were approaching employees 'at work' [which is how Rivera characterized Taylor's statement], as opposed to being approached during their breaks, this would be a violation of the no-solicitation policy, and the facility had a legitimate right to be concerned about any disruptions during working time or in patient care areas." Kantarze testified that an employee asked, "What do I do if people are bothering me while I'm working?" and that Taylor stated that the employees "should not get into an argument, but should instead let their supervisor know if they are being bothered during work time." Taylor testified he told the employees that they were there to take care of the residents and had a right not to be interfered with during their worktime, but that what they did on their lunch or break was their business. I credit Kantarze and Taylor's version over that of Flores and Riveria whose versions I found to be inaccurate representations of what occurred at the meeting. Under these circumstances I find that Respondent did not violate the Act with respect to these allegations.

F. Alleged Threats to Withhold Wage Increases

With respect to the alleged unlawful threats to withhold wage increases, I also find no violation of the law occurred. Initially I credit the testimony of Taylor as outlined above that he was not aware of the union campaign at the time of the first meeting held on the Monday that he first arrived at the facility. This is consistent with the testimony of Flores that Taylor made no mention of the Union at this meeting and only raised the subject of the Union at the first of the Respondent's campaign meetings which was held on Thursday later that week. According to the testimony of Flores, at the first meeting Taylor "said they going to, the administration going to check in all the records and check the evaluation and everything. If we allowed to have a raise, they going to give it to us. That was the first meeting." "In the second meeting he say that the administration is not allowed to do no raise, no nothing about the insurance, anything until the union process finish." Ponzella testified that at the single meetings she attended in either late January or early February 1992, Taylor said that, "he had reviewed the raises that were supposed to be given that we had been waiting for, and that no raises were to be given until after union activity was settled," but that he "did not give any indication as to why." On cross-examination Ponzella verified the accuracy of her affidavit to a Board agent concerning this allegation wherein she had stated "at the benefits meeting, Taylor said that any raises would be put on hold until the union issue is resolved." She further stated at the hearing that the foregoing comment had been made but that "I wouldn't say it was the only comment that was said." The General Counsel contends that "Taylor made a blanket statement and did not make it clear to employees that whatever increases were due would be paid whether or not they select a union, and that the sole purpose for the postponement of adjustments is to avoid the appearance of influencing the election's outcome." Also that, "Without these assurances, the effect of the statements was to equate employees' economic interests with a quick end to the union activity, thereby violating Section 8(a)(1) of the Act." The Respondent contends that there is nothing unlawful about Ponzella's or Flores' versions even if they were to be credited as "Taylor did not say that any decision had been reached regarding raises, nor did he promise a raise." This is consistent with the testimony of Taylor and Kantarze to the effect that they were reviewing all problem areas at the facility when they first arrived and discussed those issues with employees. Once the Union began organizing, and the election petition was filed, the facility was not legally permitted to give raises until the election process was finished. Respondent cites Taylor's and Kantarze's testimony that a raise that had been discussed prior to their knowledge of the union campaign including both correcting discrepancies if management errors had resulted in an employee missing a wage increase and a general wage increase, but that after their knowledge of the union campaign, and when employees continued to ask questions about wage increases, that Taylor's response was that errors and discrepancies could be corrected, but there could be no general changes in wages until after the completion of the election process. Considering all of the foregoing, I find no violation of the Act concerning Taylor's discussion of raises. In a situation such as this an employer is in a difficult position so as to avoid the risk of violating the Act by either withholding a promised wage increase or giving a wage increase which it cannot document was promised. I find that allowing for less than exact recall by Flores and Rivera concerning Taylor's statements regarding wages and yet relying on their versions that Taylor made clear that the election campaign precluded a general wage increase until after the election and crediting Taylor's and Kantarze's versions that it was made clear that it was the election process that precluded a general wage increase, that the evidence in this case does not establish a violation of the Act.

G. Futility of Union Support

Ponzella, Flores, and Rivera all testified that Taylor stated in one of the general employee meetings that there would be no change in benefits in the event the Union was selected by the employees as their collective-bargaining representative and that the payment of dues would be the only change resulting from the selection of the Union. In this regard Ponzella testified that Taylor had discussed the negotiation process and said "the only negotiations that would occur would be through the Company and through the Union, and that the big corporation will ultimately have the final decision." Flores testified Taylor said, "Nothing can change because the Union has to talk with them first. The only change is that we have to pay dues." Rivera testified as follows:

> If the Union were to get elected that there would be no changes in benefits. The only thing that would change is that we would have to pay union dues. And if any changes were to be made the Union had to go through them and get it okayed before there would be any kind of changes [Tr. 90]. . . . [Taylor indicated] that if they were to sit down at the negotiating table that they would have to ask administration first before they would make any decisions on a contract [Tr. 99]. . . . That the administration had to give the okay before they could get any contracts signed or anything like that. They would have to approve what they were negotiating. The administration would have to approve it before it was approved [Tr. 100].

Taylor testified he discussed negotiations and discussed it utilizing the same speech he uses in every election campaign as follows:

> Folks, I want you to hear both sides of the story. You have a right to have an election, and if you win the election you need to know that the law provides that the Union and our Company must meet at a reasonable hour, that negotiations start. And just as plain as I am sitting here, I always do it just like this. And in the negotiations, one of three things can happen. It's a negotiation process, folks, and you know what negotiation is. You can get more, you have the same, or you can get less. I even went further than that, I said the law provides that neither one of us have to agree, but we have to meet together and negotiate in good faith.

Taylor's testimony was corroborated by Kantarze and Viduiera. It is clear from the testimony of Ponzella, Flores, and Rivera that they believed that Taylor was telling them that nothing could change. However their own testimony does not support this as it speaks in terms of negotiations. Even assuming that Taylor may have stressed that the Respondent was not bound to agree to any changes, it is clear that he covered what the negotiation process entailed from a reference to Rivera's testimony in particular. Moreover, Taylor's testimony appears consistent with Rivera's although it is more detailed concerning the give and take of collective bargaining. As the Respondent argues in its brief, Taylor told the employees that the Respondent would have to agree to any changes which is an accurate description of the negotiation process. I accordingly find no violation of the Act in this instance and shall recommend the dismissal of this allegation.

H. Interrogation

I credit the testimony of Flores that she was called up to the front of the room at a general employee meeting by Taylor and told to smile three times over the denial of Taylor that he did so. I also credit her testimony that prior to the end of this meeting Taylor asked the employees who wanted to give management "another chance" (in reference to the election campaign) to raise their hands and stand and move to the side of the room where he was standing and at that point, all of the employees stood and moved to Taylor's side of the room. Although Taylor testified he was surprised to see the employees follow him out of the room, I found Flores' testimony specific and credible. Moreover, I note that Acting Administrator Kantarze recalled a general meeting at which she was speaking with a "C.N.A. at the end of the meeting, and at the end of that I looked up and all of the associates had walked to one side, but I have no idea what transpired, because I was in a conversation." I find that Taylor's conduct in asking all of the associates to stand up and move to him placed them in a situation wherein they were required to do so or risk Respondent's displeasure if they did not do so and were thus viewed by Respondent as in favor of union organization. The net effect of this was an act of interrogation by requiring employees to assert their sentiments concerning the union publicly. I find that by this conduct Respondent violated Section 8(a)(1) of the Act.

I. The Creation of Impression of Surveillance

I credit the testimony of Flores and Rivera that at the second general meeting held by Taylor, he told the employees that the Respondent knew of the union meeting scheduled for the next day and the time and place citing Fort Smith Boulevard on which Rivera lived and where the meeting was scheduled to be held and that Taylor then looked at Rivera. As noted supra I found these employees to be credible witnesses. In evaluating their testimony I have also given weight to the fact that they have nothing to gain from their testimony. Having thus credited their testimony I find that Respondent violated Section 8(a)(1) of the Act by creating the impression that the union activities of the employees were under surveillance by Taylor's comments as set out above.

J. Interrogation by Soliciting Signatures on Antiunion Petition

Acting Administrator Khrys Kantarze admitted that she initially prepared, maintained in her office in February 1992, and later posted outside the office, a large poster on which a number of management and nonmanagement employees had affixed their signature under the statement, "We want to give new management a chance. We don't need a union now." Kantarze testified that after she was appointed acting administrator of Deltona, her "department heads kept coming to me and saying that we're just so happy now that you're here, things are getting done." They were also pleased with her appointment of a replacement for the director of nursing who had been terminated. She asked them if they would show that support "to the line staff." In addition to the department heads dozens of nonsupervisory employees also signed the poster although Kantarze testified she did not ask anyone else to sign the poster. The General Counsel contends that "Respondent's maintenance and circulation or presentation of such a document, with its implicit invitation to sign, is inherently coercive" unlawful interrogation and contends that whether employees elect to sign or abstain from signing, their sympathies tend to be revealed, making it

inherently coercive. Respondent notes that the evidence establishes only that Kantarze asked the department heads to sign the poster which was later placed in the employee lounge for an hour or two and was signed by nonmanagement employees. There was no evidence that anyone actively solicited employees to sign the petition which was only initially signed by department heads. This was noncoercive, antiunion solicitation by the employer and was not violative of the Act. This situation is not unlike the lawful distribution of antiunion campaign literature by an employer. I find the General Counsel's argument compelling. The posting of this document was inherently coercive and violative of Section 8(a)(1) of the Act and constituted unlawful interrogation in violation of Section 8(a)(1) of the Act.

K. Alleged Prohibition of Discussion of the Union

The complaint alleges that on or about February 5 or 6, 1992, Kantarze prohibited employees from discussing the Union at any time at Respondent's facility. In support of this allegation the General Counsel produced the testimony of Rivera who testified on direct examination that in early February 1992, Kantarze:

> [C]alled me into her office and she said she was going to give me a verbal warning because she had overheard or somebody went to her saying that there was a group of girls in the facility, which I was one she said, that was talking about the Union, and we were cursing and carrying on. She said she was going to give me a verbal warning, but the next time that she hear any talk about the Union in the facility that she was going to have to write me up.

She testified further that Kantarze did not say when or where she could discuss the Union, but "said that if she hears any more talk about the Union in the facility, that she was going to take further action," and that Kantarze made no mention of breaktime or lunchtime. On cross-examination she denied that this involved an argument with another CNA Maggie Rodriquez or that there was any discussion of this. She acknowledges having been involved in an incident with CNA Rose Picada wherein Picada came up to her and asked her to "leave everybody alone in the nursing home" and that an argument then ensued between them.

In support of Respondent's defense to this allegation, Kantarze testified that she had discussed the Respondent's "no solicitation/no distribution" policy in February 1992 at a general staff meeting including CNAs and told the employees that:

> They can do what they wanted on their time, meaning before work, after work, on their break time, and at lunch time, but on work time and in resident areas they could not discuss the Union?

Subsequently in early February she received a complaint from a family member of one of the residents "that a fight had taken place over the weekend between a couple of associates." She interviewed the witnesses and found that an argument had taken place between Rivera and CNA Millie Ramos with profanity used in and around a resident's room and that the family member had heard the word "union" which was the subject of the argument. This is documented by statements of various witnesses. She called both Rivera and Ramos into her office individually, and "told them again, that what they did on their own time was their business and everyone had a right to their opinion. However, on my time, when it's involving the residents, which is why we're all here, that I could not let that happen on work time and in resident areas." Subsequently, in late February she was pulled out of a meeting and observed Rivera and Rosemary Picada "yelling at each other in the dinning [sic] area, again, when the residents were being served their lunch trays." She "pulled them both into the chapel and tried to establish what took place." They "continued to yell at each other." She calmed them down and sent them back to work and told them they were not to discuss anything about the Union on worktime. She subsequently counseled with them individually and told them she had no problem with anyone standing up for what they believed in but during worktime, they were there to take care of residents and the residents should not be put under this stress and "again reiterated the issue about before work and after work and on breaks." Respondent also maintains a lawful no-solicitation/no-distribution policy which Kantarze testified is reviewed with the employees during their orientation and a copy of which they are given. The policy states as follows:

> Solicitation or distribution of literature by an associate is prohibited while on working time. Working time is all time when your duties require that you be engaged in work tasks, but does not include your own time, such as a meal period or scheduled break time. Solicitation or distribution of literature is prohibited at all times in resident care areas.

I credit Kantarze's version of these meetings over that of Rivera. It is clear to me that the early conference with Rivera was in response to the resident's family's complaint as testified to by Kantarze and I credit her version of what she told Rivera which is consistent with an appropriate response to the incident and which was consistent with the lawful policy in the employee handbook. The later incident was personally observed by Rivera and I find her response to be lawful. I accordingly recommend dismissal of this allegation.

D. East Molene Care Center Located in East Moline, Illinois 6–CA–22084–29 (formerly 33–CA–9745)

Statement of the Case

The charge in this case was filed by District 1199, Union of Hospital and Health Care a/w Service Employees International Unions, AFL–CIO (the Charging Party, District 1199, or the Union) on March 6, 1992, and a first amended charge was filed by the Charging Party on May 27, 1992.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by the following conduct:

(a) During November 1991, more strictly enforced a work rule regarding personal calls against an employee believed to be a union supporter.

(b) From on or about January 1, through and including May 15, 1992, by East Moline Care Center Administrator Joe Parks, Director of Nursing (D.O.N.) Stephanie Jordan, Human Resources Representative Joe Maniaci, Human Resources Representative Jill Carroll, Charge Nurse Marilyn Klundt, and Regional Director of Human Resources Robert Findeiss, surveilled the union activities of employees by following them around the facility throughout the course of the workday.

(c) On a specific, but unknown date during the first week in January 1992, by Charge Nurse Dawn Scott, interrogated employees concerning their union membership, activities, or sympathies.

(d) On a specific, but unknown date in January 1992, by Maniaci threatened employees at a staff meeting that he would see that Respondent was sold if the Union was voted in.

(e) On or about January 29, 1992, by Maniaci and Carroll interrogated employees concerning the Union.

(f) On or about January 21 and February 6, 1992, by Parks, Maniaci, Carroll, Findeiss, Dietary Supervisor Brenda Williams, and other specific but unknown supervisors or agents, threatened to call the police and physically interfered with employees as they attempted to distribute union handbills outside the Respondent's facility.

(g) In January or February 1992, promised employees benefits if they completed and signed an antiunion survey.

(h) From about late January or February 1992, until about February 15, 1992, posted two security guards at its facility in order to interfere with employees' union activities.

(i) In about February 1992, maintained and strictly enforced a rule which required employees believed to be union supporters to change lunch periods and to report to and/or notify a supervisor before taking lunch and breaks.

(j) On or about February 6, 1992, by Activities Director Georgina Bowers, interrogated employees in a resident's room concerning their union membership, activities, or sympathies.

(h) On or about February 6, 1992, more strictly enforced a work rule regarding campaigning in resident areas against employees believed to be union supporters.

(l) On or about February 12 and 13, 1992, required off-duty employees to produce identification before being permitted to enter the facility.

(m) On February 13, 1992, the date of the election discussed infra, Respondent, by Jordan, surveyed the activities of employees by following them throughout the day, including times when they were going to the polling area to vote.

The complaint further alleges that on or about February 7, 1992, Respondent suspended its employee Dorothy Theunick and discharged her on or about February 11, 1992, and has since refused to reinstate her, because she joined or assisted the Union and engaged in concerted activities and to discourage employees from engaging in such activities by the suspension and discharge and that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

The complaint also alleges that on or about March 10, 1992, Respondent suspended its employee Robyn Weimer and discharged her on or about March 13, 1992, and has since failed and refused to reinstate her and that on or about March 13, 1992, Respondent discharged and has since refused to reinstate its employee Candy Guss and that on or about March 11, 1992, Respondent suspended its employee Terri Beckman and discharged her that on or about March 13, 1992, Respondent discharged and has since refused to reinstate its employee Cheryl Wingert. It is alleged that the actions against Weimer, Guss, Beckman, and Wingert were taken because these named employees joined or assisted the Union and engaged in concerted activities and to discourage employees from engaging in such activities and that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

It is further alleged and admitted by Respondent that the following employees of Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time housekeeping aides, dietary aides, certified and non-certified nursing assistants, central supply employees, dishwashers, cooks, rehabilitation aides, medical records assistant, activities assistants, maintenance aides, and laundry aides employed by the Employer at its East Moline, Illinois, facility; but excluding the administrator, director of nursing, registered nurses, licensed practical nurses, social services director, activities director/coordinator, program coordinator, dietary manager, housekeeping supervisor, business office manager, medical records director, bookkeeper, maintenance supervisor, office clerical employees and guards, professional employees and supervisors as defined in the Act.

It is further alleged, but denied by Respondent, that from on or about December 1, 1991, to December 24, 1991, a majority of the unit designated and selected the Union as their representative for purposes of collective bargaining and that at all times since December 24, 1991, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive bargaining representative of the unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The complaint further alleges that on or about December 24, 1991, the Union, by certain of Respondent's employees, requested Respondent to recognize it as the exclusive collective-bargaining representative of the employees in the unit and to bargain collectively with it as the exclusive collective-bargaining representative of the employees in the unit with respect to their rates of pay, wages, hours of employment, and other terms and conditions of employment and that since that time Respondent has failed and refused and continues to fail and refuse, to recognize the Union as the exclusive bargaining representative of the unit and has thereby violated Section 8(a)(1) and (5) of the Act.

The complaint also alleges that the alleged violations of Section 8(a)(1) of the Act and Section 8(a)(1) and (3) of the Act are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and conducting a fair rerun election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone. The Respondent denies the commission of any unfair labor practices, the majority status of the Union as collective-bargaining representative of the employees in the unit and opposes the issuance of a bargaining order.

Background

East Moline Care Center is located in East Moline, Illinois. In December of 1991, Respondent employed 103 hourly employees in departments covered by a representation petition filed by the Union. In the fall of 1991, Respondent employed approximately 42 certified nurses aides (CNAs) on its first, second, and third shifts. The administrator of the Health Care Center was Joseph Park. Stephanie Jordan was the director of nursing (D.O.N.). Candice King was the assistant director of nursing (A.D.O.N.). In the fall of 1991, the employees became interested in organizing a union. Dorothy Theunick, a long time employee who had worked at the facility as a certified nurses aide (CNA) intermittently over a period of 20 years, was asked by certain of the employees about contacting a union as her husband was a union official with the United Auto Workers (UAW). Theunick was also employed full time at a local public

high school and was a member of a union at that facility. She worked the night shift at the East Moline Care Center facility. Theunick contacted Alice Bush, the business manager of the Union, in November 1991. Initially Bush met with a few employees at Theunick's home concerning organizing the employees at Respondent's facility. Subsequently, Bush met with other employees at a Burger King restaurant on December 9, 1991, and distributed union authorization cards to employees Tara (Beckman) Smith, Nancy Beckford, Denise Blackwood, Julie Etheridge, Candy Guss, Connie (Hess) Partain, Deena Reilly, Robyn Weimer (who is the daughter of Dorothy Theunick), Pattie Williamson, and Eva Winfree all of whom were in attendance at that meeting and received them back signed by the employees at the meeting. Bush also formed an organizing committee among the employees at that meeting and instructed them concerning the solicitation of other union authorization cards from employees at the facility. Although Theunick was not at this meeting she also signed a union card on that date. Subsequently, Theunick solicited union authorization cards from 22 other employees from early to mid-December 1991. Tara Smith, Candy Guss, Connie Partain, and Robyn Weimer also solicited authorization cards from other employees on behalf of the Union. Tara Smith received a signed card from CNA Cheryl Wingert dated December 10 on or about that date. The signed cards were returned to Bush at organizing meetings and when Bush had received more than a majority of signed cards of the employees she instructed them concerning a demand for recognition to be made to Respondent. Thereafter on December 23, a group of approximately 10 employees including Theunick, Weimer, Guss, and Smith went to Facility Administrator Park's office and asked if he would recognize the Union as their collective-bargaining agent on the basis of the cards signed by in excess of a majority of employees in the unit. One employee told Park that 75 percent of the unit employees had signed cards. Theunick and Weimer both asked Park to recognize the Union. Park told them they were talking to the wrong person and should contact their union representative. Thereafter the employees met with Bush and the Union filed a petition for an election the next day. The Respondent and the Union entered into a Stipulated Election Agreement on January 21, 1992. Between the end of October and the first part of November 1991 CNAs Robyn Weimer and Candy Guss knocked on the door of Administrator Joe Park and asked to talk to him. They told him they were concerned about staff and supply shortages and improperly working equipment and also informed him that some of the CNAs were talking about organizing a union. Weimer testified that Park then said, "Well I'll call Human Resources because we don't want a union in here. It would stop our open-door-policy." Weimer testified that Robert Findeiss (the regional director of human resources) and Joe Maniaci (a human resources representative) arrived at the facility the next day. Candy Guss testified that during the conversation with Park she asked for Jill Carroll's phone number who had formerly performed work at the East Moline facility and who was then working in human resources. Park told her he could not give her the telephone number. Guss testified further that at the time the Union had not yet been contacted. I credit the testimony of Weimer and Guss as set out above which was not directly repudiated by the testimony of Park, but who testified rather that while he was in Springfield, Illinois, he learned that authorization cards were being distributed at the facility during a telephone call he made to the facility. He then called his supervisor, Susan Franklin, and was called by telephone by Human Resources Representative Joe Maniaci that same afternoon and Maniaci arrived at the East Moline facility the next day. There is an obvious discrepancy between the testimony of Weimer and Guss and Park in this regard but it is not significant for purposes of this decision. The violations are alleged to have occurred prior to the election which was held on February 13, 1992, and which the Union lost by a vote of 53 to 34. The Union has filed timely objections to the election on the basis of the alleged unfair labor practices and also other independent allegations of conduct affecting the election which were consolidated with this complaint for hearing. The General Counsel is seeking a bargaining order on the basis of the alleged violations at the facility as well as other relief.

A. The Alleged 8(a)(1) Violations

1. Alleged interrogation of employee Robyn Weimer by Director of Associate Relations Robert Findeiss

CNA Robyn Weimer testified that she and CNA Candy Guss were members of an employer sponsored resolution committee made up of five or six employees that met with East Moline Care Center Administrator, Joseph Park, to resolve problems affecting employees. She and Guss both went to see Park sometime between the end of October and November 1, 1991, and told him they were concerned with the shortage of staff, linen, and proper working equipment and that some CNAs were talking about forming a union. He told them he would call human resources as he did not want a union because it would stop their open-door policy. Weimer testified further that the morning after this discussion with Park, Robert Findeiss (the director of associate relations for Region 5 which includes the Care Center Facility), and Joseph Maniaci (an associate resources representative with responsibility for the Care Center) appeared at the Care Center. Findeiss, whom Weimer had previously met when she had aired some complaints to him shortly after she had commenced her employment with Respondent, called her name as she was working on the floor near station B and asked if he could speak to her. She replied in the affirmative and he approached and asked her how true the talk of a union was and she said it was very true. He then asked if she thought it would get through and she said "yes." He then asked her if he knew who had started it and she said, she did not. He also asked her if she had seen cards (union authorization cards) going around and she told him she had not. At the hearing Findeiss denied having engaged in the above interrogation.

Analysis

I credit the specific testimony of Weimer as set out above. I found her testimony to be specific, detailed, and straightforward. I thus find that by this interrogation of Weimer engaged in by Findeiss, the Respondent violated Section 8(a)(1) of the Act. I grant the General Counsel's motion to amend the complaint to include this allegation which I find was fully litigated at the hearing.

2. Alleged promises of benefits if employees completed and signed an antiunion survey and other prizes—alleged threat to close the Care Center

The witnesses called by the General Counsel testified that shortly after the employees went to Park's office to request recognition the Respondent held an all staff meeting to discuss the union campaign. This would have placed this meeting in late December or early January, as the date of the request for

recognition was December 23, 1991, and the petition for an election was filed the next day. However, at the hearing the Respondent introduced a sign-in sheet which shows the meeting date to have been December 18, 1991, which was 5 days prior to the December 23 request for recognition. This discrepancy is not material to the analysis of these allegations as assuming arguendo the correctness of either date there is no dispute concerning the general substance of the meeting. In fact two meetings were held by management in order to cover the day and evening shifts. At each of the meetings Associate Relations Representative Maniaci distributed a quiz and instructed the employees to examine and fill out the quiz. Maniaci gave the employees Respondent's "correct" answer to the quiz and told the employees that any employee who signed and handed in the quiz would be eligible to win one of three grocery carts full of groceries which were in the room where the meetings were held and one of which would be raffled off the next three succeeding Fridays. The grocery carts were filled with groceries which had been purchased by Director of Associate Relations Findeiss. Maniaci told the employees at the afternoon meeting that the contents of the grocery carts represented the amount the employees would pay in dues for a year if the Union were elected in the upcoming election. Findeiss who spoke at the second meeting testified that he told the employees at that meeting that the purpose of the grocery carts was "to show an approximate representation of what the Union dues may be for a year." During the meeting Theunick responded to Findeiss that this was not true and held up her paycheck stub from the high school where she worked during the day to show that the union dues did not cost as much as Findeiss had indicated by reference to the shopping cart. At that point according to the testimony of Theunick she was told she could not pass her check stub around and to sit down or she "would be evicted from the meeting." Theunick testified further that at this meeting Findeiss stated "he would see the place sold before he would ever let it become union." CNA Connie (Hess) Partain who was employed at the East Moline Care Center from 1982 to 1992, also testified that at that meeting, someone was arguing with Findeiss and he became angry and said, "I will sell the Company before I see it turn union." Partain testified further that at a subsequent meeting held by Respondent's management to discuss the union campaign, she spoke up to Findeiss and "told him that I was tired of hearing all the lies because they kept saying that the Union was promising us things that they weren't doing." She told him, "You should come to the meetings if you want to hear what they are saying." Findeiss told her "to shut up and sit down, that nobody wanted to hear what I had to say because it was just my last hurrah because he figured I was quitting anyway, so why did I care." She testified that Findeiss was aware she was about to quit her job because she was graduating from school as a registered nurse.

Findeiss acknowledged having attended both of these meetings and that at the first meeting Maniaci and Park had spoken, but that at the second meeting he also spoke. He acknowledged the statement by Theunick concerning the dues and stated he told her that neither he nor she knew what the union dues would be and that the goods in the shopping cart were an "approximate estimation of what the dues would be." He denied that he at any time said during that meeting that he would sell the facility if the Union won the election. He further contended that as a result of his training received at numerous sessions concerning union organization, there was "no way that I would make a statement such as that."

CNA Laura Karn who remained an employee at the Care Center at the time of the hearing in this matter testified under questioning by Charging Party Representative Alice Bush, that during the course of the campaign meetings conducted by Respondent at the facility, the Respondent offered several prizes to employees in addition to the contents of the shopping carts. The Charging Party introduced the contents of a poster which language thereon was read into the record and which was posted the day after the election. The poster encouraged the employees to vote and stated that they would be "eligible to win one of the following when you exercise your right to vote: a dream weekend for two," "4-$40 gift certificates to Eagles Grocery," "$100 gift certificate to South Park Mall" yard [sic] to the side of the $100 gift certificate were the words "clothes, toys, tapes jewelry," "free lunch for one year." Thereunder it said "Please Vote." Underneath the listing of the various gifts were the names of the employees who had won them. Karn testified that several of the employees who won the prizes had been openly against the Union during the campaign wearing vote-no buttons and that she did not know of any employees who had won who wore vote-yes buttons during the campaign.

Analysis

The General Counsel contends that Respondent's weekly grocery cart raffle and its voting incentive awards violated Section 8(a)(1) of the Act as promises of benefits to dissuade the employees' union activities. Respondent contends that the survey (the quiz) does not contain any threats or promises. Respondent argues further that in the instant case the grocery raffle was neither objectionable nor unlawful as the raffle was open to all employees regardless of their union sympathies and although the employees were required to sign the surveys to participate in the lottery, they were not required to answer the questions in any particular manner, and the answers were given to the employees at the meetings. In support of its position Respondent cites *Thrift Drug Co*., 217 NLRB 1094, 1095 (1975), wherein an employer circulated a true-false quiz based on the employer's campaign propaganda and offered a camera to the employee who answered the most questions correctly. In that case the Board held the contest lawful as winning was not contingent on supporting the employer's position. Respondent also cites *Hollywood Plastics*, 177 NLRB 679 (1969), wherein a raffle of groceries valued at $82 was held to be lawful, and *Gibson Greeting Cards, Inc*., 177 NLRB 589 (1989), wherein a raffle of groceries valued at $84 was held to be lawful.

I find that the raffle of groceries was lawful as was the award of the various prizes to employees as an inducement to vote in the election. I find no evidence that either was utilized as an inducement to dissuade the employees from supporting the Union but rather that they were permissible methods to generate employee interest in the upcoming election and to induce the employees to vote. The cases cited by the Respondent clearly support the Respondent's position in this case that the raffle of groceries and the award of prizes were lawful as they were not premised on any unlawful purpose to dissuade the employees from supporting the Union. I have also considered Karn's testimony that several of the prize winners wore vote-no buttons and that she was unaware of any union supporters who won prizes. However, there was no additional evidence presented which would tend to show any impropriety in the award

of prizes. I thus find that Respondent did not violate the Act by the raffle of groceries and the award of prizes.

With respect to the testimony of Theunick and Partain that at the second meeting Findeiss told the employees he would see the facility sold before he would see it became unionized, I credit their testimony as specific and detailed, notwithstanding Findeiss' contention at the hearing that as a knowledgeable professional in the labor relations field, he would not make this type of statement. As both the testimony of Theunick and Partain bears out, Findeiss became angry when his statements were challenged by these employees. I thus find that Respondent violated Section 8(a)(1) of the Act by his threat to sell the facility. I note the complaint allegation incorrectly designated Maniaci rather then Findeiss as the person who made his statement.

3. Alleged interrogation of employee Dorothy Theunick by Charge Nurse Dawn Scott

Theunick testified that in January Charge Nurse Dawn Scott approached her while she was in a patient's room and asked her whether she was going to vote for the Union and why she was for the Union and what did she think the Union could do for the employees. Theunick told her they were in a patient care area and that she was going to vote for the Union. I credit Theunick's testimony in this regard which is unrebutted as Scott did not testify.

Analysis

I find that under the standards established by *Rossmore House*, 269 NLRB 1176 (1984), the questioning of Theunick, a known and vocal union supporter, by Scott without more did not constitute coercive interrogation. In the instant case there was no evidence that Scott made any threat or promises or engaged in any other unlawful or coercive conduct in connection with this incident. See *Morgan Services*, 284 NLRB 862 (1987).

4. Threat to call the police issued by Maniaci to union supporters distributing campaign literature

In mid-January 1992, several of the employees distributed campaign literature on behalf of the Union to other employees at the front entrance and at the Station C entrance, the ambulance entrance of the care center between 5 a.m. and 7:30 a.m. Employees Partain, Sandy Ewing, Terry and Tara Smith distributed leaflets at the front entrance and employees Weimer, Guss, and Winfree did so at the ambulance entrance. Maniaci told the employees at both entrances that he would call the police if they did not move off of Respondent's property. Weimer held up a leaflet listing employee rights and told Maniaci to do what he had to do as she knew her rights. The employees continued to distribute the literature and no police arrived. Maniaci testified that he told the employees at the front entrance not to block the entrance and he would not have to call the police. He testified he did not call the police. Partain testified that while she was distributing leaflets at the Station C entrance Maniaci and Park approached and one of them told her if she did not stop, they would have to call the police. She "kind of laughed it off at first, so they repeated it—," and said "Connie, I don't want to have to call the police." She "told them to do whatever they had to do" as she "has a right to do this." On cross-examination by Respondent's counsel as to whether Maniaci had said, "Please don't block the entrances," Partain testified, "No, I don't recall him saying that, no." CNA Sandra Ewing testified she was at the Station C entrance with Terry and Hess (Partain) and that Maniaci initially said that they should not be there and to go back out in the street. They complied and Union Organizer Alice Bush told them to go back to the doorway and Maniaci told them they could not be doing this and that he was going to have to call the police and that he did not want to have to do this. Guss testified that she leafleted with Tara Beckman (Smith), and Weimer in the back parking lot and Maniaci came out and "asked us to leave and he told us that he did not want to call the police on us." They did not leave and Maniaci returned and said, "Please, ladies leave before I call the cops."

Analysis

I credit the testimony of the CNAs as set out above over the version given by Maniaci wherein he described his threat to call the police as being concerned with the employees blocking the entrances. I note that even under Maniaci's version he did not testify that the employees were actually blocking the entrances, nor did he ever disavow his threat to call the police. I find Maniaci's threat to call the police was inherently coercive and violated Section 8(a)(1) of the Act. There is no evidence to support Respondent's position that the employees were blocking the entrance so as to justify a threat to call the police. See *Nashville Plastic Products*, 313 NLRB 462, 463 (1993), wherein the Board held, "An off-duty employee seeking access to the employers' property to distribute union handbills, unlike a nonemployee union organizer, falls within the scope of Supreme Court decisions protecting work place organizing activities," citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978).

5. Interrogation of CNAs Laura Karn and Mamie Terry by Maniaci and Hankley

Laura Karn, a CNA who was still employed by Respondent at the time of the hearing, testified that in either the end of January or the first of February, Maniaci stopped her and fellow CNA Mamie Terry in the hallway at the facility on station B on their worktime and asked them if they knew who had started the union campaign and they replied that they did not know. Associate Relations Representative Jill (Carroll) Hankley was also with Maniaci at the time and she asked if Robyn (Weimer) and Dorothy (Theunick) were the ones who had started the union campaign, Mamie Terry replied that if they were "thinking of those two, you've got the wrong two." Maniaci and Hankley both denied that they engaged in interrogation of employees concerning the union campaign.

Karn testified further that in February 1992 she was in a patient's room along with Terry and they were getting patients ready to go to supper when Georgina Bowers, Respondent's head of activities at the facility came in. Bowers then asked them if they were for the Union. Before they could reply, Bowers asked her if they were going to vote for the Union. Karn responded, "Probably, yes." Bowers then asked what she thought she was "going to get out of the Union." Karn replied, "Better working conditions and hopefully better wages." Bowers then asked "Don't you have that now?" Karn replied, "No, I don't." This conversation lasted 10 to 15 minutes according to Karn. Karn testified that when she went through orientation after her employment in March 1989, she was told that the employees were "not to speak of personal or private matters in front of residents." Bowers was not called as a witness. Respondent's "Hourly (Nonexempt) Associates Handbook" con-

tains a rule prohibiting solicitation "while on working time" and "at all times in resident care areas."

Analysis

I credit the testimony of Karn who was a current employee at the time of the hearing. I found it explicit and detailed as set out above. Bowers did not testify and Karn's testimony in this regard was not rebutted. I do not credit the denials of Maniaci and Hankley. I find that in each instance Respondent's interrogation of Karn and Terry was inherently coercive and violative of Section 8(a)(1) of the Act. As the General Counsel contends, none of the direct probing questions were preceded by the assurances set forth in *Struksnes Construction Co*., 165 NLRB 1062, 1063 (1967). See *Rodeway Inn of Las Vegas*, 252 NLRB 344, 346 (1980).

6. Disparate enforcement of Respondent's no-solicitation rule

Respondent's employee handbook (G.C. Exh. 9) distributed to employees at the time of their employment contains a no-solicitation rule as follows:

> Solicitation or distribution of literature by an associate is prohibited while on working time. Working time is all time when your duties require that you be engaged in work tasks, but does not include your own time such as a meal period or scheduled break time. Solicitation or distribution of literature is prohibited at all times in resident care areas.

It also contains a provision entitled bulletin boards which states:

> Facility bulletin boards will be used by management to post official communications to associates as well as any information that affects the facility or your job.

Theunick testified that shortly before the election CNA Jerry Davis wore a heart-shaped billboard over the front and back of him saying "Have a heart, vote no for the union," which she observed him wearing on duty and in patient care areas. She asked D.O.N. Jordan why he could display that sign when other employees were not allowed to wear buttons and that Jordan said, "He's entitled to his own opinion." Theunick testified that she wore a Union "Vote Yes" button but was not allowed to wear it near B Station which was her work area. Karn testified that she wore a Union campaign button that said, "Vote Yes for the Union," but that she only wore it 1 day. She began to notice campaign literature about the second week in January. There were several posters in the hall going from station B to the timeclock that stated "vote no for the Union." She observed CNA Jerry Davis who worked on the third shift putting up a red, heart-shaped poster on the bulletin board across from station B. She and Theunick both told him he was not allowed to put the poster up there. The bulletin board was used for resident's birthdays and activities and anything other than this required the administrator's signature. Davis responded that he could put the poster wherever he wanted. She and Theunick went to D.O.N. Jordan who was coming up the hallway and told her that Davis had put up the poster. Theunick told Jordan that Davis did not have the right to put any campaign material on the bulletin board. Jordan "started giggling" and said, "He has his rights to his own opinion." Although Jordan was called to testify by Respondent she was not questioned concerning this incident. CNA Sandra Ewing testified that she observed CNA Davis wearing the heart-shaped sign which said "Have a heart, vote no" about 3 or 4 days before the election at station B, an area where there are patients CNA Partian testified she observed antiunion posters in the breakroom.

Respondent contends in its brief that this allegation is based solely on the "unsubstantiated uncorroborated and incredible testimony of Dorothy Theunick." However as noted above the no-solicitation rule prohibits solicitation which would include solicitation for a union and the bulletin board rule limits posting to official communications. Moreover both Karn and Ewing testified concerning the wearing of the sign by Davis throughout the facility. While it is apparent that some of the CNAs wore vote-yes buttons in favor of the Union without incident, this appeared to be limited in scope and there was no disavowal by the Respondent of its rule prohibiting solicitation and limiting the bulletin board usage. I credit the unrebutted testimony of Theunick, Karn, Ewing, and Partain as set about above.

Analysis

I find that the above-credited testimony of the CNAs in conjunction with the existence of the no-solicitation rule and bulletin board rule establish that Respondent continued to require adherence to these rules by not disavowing them and permitted antiunion postings by employee Jerry Davis. This resulted in disparate enforcement of these rules and was violative of Section 8(a)(1) of the Act. See *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992). I make no finding of a violation by reason of Respondent's administrator's, Park's, posting of an antiunion campaign poster in the breakroom. An employer has the right to post campaign literature on its bulletin boards and premises while prohibiting employees from posting prounion material. See *Fairfax Hospital,* 310 NLRB 299 (1993). With respect to the wearing of an antiunion sign by Davis, I make no finding of a violation as the testimony of several of the CNAs was that they wore prounion buttons at various times in the facility without interference. In this regard Theunick's testimony that she was told to remove the button was not specific so as to identify by whom she was told to remove the button and I do not place any reliance on it.

7. The hiring of guards

The Respondent hired unarmed security guards in mid- to late-January until after the election in February. Administrator Park testified that he made the decision to hire security guards as a result of reports of vandalism to vehicles in parking lots. He testified that employee Lynn Ruskey told him she had a hood ornament taken from her automobile, nurse Sally Keller told him she believed that someone had scratched the side of her car with a key and that CNA Hess (Partain) "mentioned a tire." Park testified he instructed the supervisor of the guards that "I wanted them to keep an eye on the parking lots to make sure that vandalism didn't occur to any of the associate's vehicles." The first night or two the guards stayed outside in their vehicles. After that Park instructed them to walk through the facility to stay warm and to keep an eye on the parking lots and periodically go out into the parking lot and inspect the vehicles, Partain was recalled by the General Counsel to rebut Park's testimony concerning her tire. She testified that there was an instance wherein she was working and Park came to her and told her one of the tires on her automobile was low and told her to go outside with him and when she went outside she saw the headlights of two vehicles with their headlights on. She told Park she had been having problems with the tire due to a slow leak. Park insisted that they go to a service station and he filled

the tire with air for her. Partain also testified that during a prior election campaign at the facility, no guards were hired. Celestina (Sally) Keller, a charge nurse called by Respondent, testified that during January she found all four of the tires of her automobile were flat. The air had been let out, but the tires had not been cut. She reported this incident to Park the next morning. Park told her to watch her car and that he was going to take care of the matter. About a week later security guards began patroling the Care Center.

Analysis

The General Counsel contends that Park's testimony as set out above is not credible and that the hiring of guards was utilized "as a means of harassment and further interference with the employees' union activities, in violation of Section 8(a)(1)." Respondent contends that Park's decision to hire guards was a legitimate business decision prompted by employee complaints.

I find that the Respondent did not violate the Act by the hiring of guards to patrol the parking lots nor by Park's decision to have them walk through the building to keep warm while periodically patroling the parking lots. With the exception of an incident on election day which will be discussed infra there is no evidence that the guards interfered with the employee's organizing efforts. Although I note some discrepancy between the versions of the type of problems associated with Keller's and Partain's vehicles, I do not find that it discredits Park's overall testimony that he received reports of problems with automobiles on the parking lots which led him to make the decision to hire guards. I credit Park's unrebutted testimony concerning the loss of a hood ornament from Ruskey's automobile. I credit Keller's testimony that someone had let the air out of all of her tires and she reported this to Park rather then Park's recall of a scratch made by a key which I find to be an error on Park's part. Similarly, I credit Partain's version over that of Park's concerning her automobile. However, even under this version, Park appears to have been genuinely concerned about her tire and was helpful in insisting she proceed to a service station where he filled the tire with air for her. Partain acknowledges that the tire had a slow leak so there is certainly no evidence that this incident was contrived by Park.

8. Alleged unlawful surveillance of employees by Respondent's management personnel between January 1 and the election in March

Facts

The General Counsel presented testimony of an increased presence of Respondent's associate resources personnel and of the facilities local management. Thus consistent with Respondent's overall labor relations policy in response to union campaigns, the associate relations personnel maintained a virtual full-time presence at this facility once the Respondent learned of the union organization campaign. Associate Relations Representative Joseph Maniaci arrived at the facility the very next day after learning of the union campaign from Administrator Park. He was joined by Associate Relations Representative Hankley who along with Maniaci maintained a virtual daily presence at the facility until the day after the election. They were also joined by Regional Director of Associate Relations Findeiss. These management representatives held large group meetings with unit employees and numerous small group or individual meetings with employees. Maniaci testified that he helped perform the CNAs and other employees work including laundry. D.O.N. Stephanie Jordan passed trays in the dining rooms during meals. Several of the employees testified concerning the frequent increased presence of the associate relations representatives and of the facility's management personnel. It is undisputed that the increased presence of Respondent's representatives was unprecedented at this facility prior to the campaign as was the assistance given by the associate relations personnel during the campaign to the CNAs in the performance of their duties. The General Counsel contends in their brief that the increased visibility of Respondent's management and associate relations representatives on the floor of the nursing home "was carefully calculated to prohibit employees from engaging in any union activity on its premises even during break time." General Counsel contends, "their individual and collective actions amounts to unlawful surveillance in violation of Section 8(a)(1)."

Respondent contends that the witnesses presented in support of this allegation testified in a conclusionary fashion and exaggerated their testimony, such as the testimony of Dorothy Theunick that prior to October 1991, she had not seen "supervisors and management personnel come out on the floor very often," but that after October 1991 "Mr. Maniaci was there at all times. Mr. Findeiss was in and out. Jill Carroll was there all the time. Stephanie Jordan was there, and everywhere we went, they were." They note that she did not testify that any of these management personnel had questioned her about the Union, but specifically remembered that Maniaci had talked to her about "everyday things." Respondent also points to Cheryl Wingert's testimony that prior to October she had not seen Findeiss very often, had seen Park "once in a while" and Jordan "on the floor when there was help needed. I saw her a lot more because she was on the floor trying to help the nurses." Wingert testified that after October she observed Jordan and Park "came on the floor and go in the rooms and ask questions of the residents and see how they were and staff. I noticed them on the floor quite a bit." She observed them "seeing if the work was done properly, seeing that the residents were getting proper care." CNA Connie Hess testified that after the advent of the campaign, she saw Park and Jordan at the facility as late as 10 or 11 p.m., and that during breaks "somebody would be in (the breakroom) from the Company." She acknowledged that she had seen management officials in the breakroom prior to the advent of the campaign, but alleged that the frequency of this increased during the campaign. Respondent contends that she acknowledged there was only a single breakroom and that more management representatives were in the facility during the campaign. Respondent also points to her testimony that she and other employees talked to supervisors in the breakroom and that she had discussed the Union in the breakroom when no supervisors were present and occasionally while supervisors were present depending on which supervisor was there. Respondent also cites the testimony of Sandra Ewing that during the campaign there were more management personnel at the facility and "on the floor working I did notice a lot of difference" and that often management personnel were in the breakroom. Respondent also cites the testimony of CNA Laura Karn who testified that Jordan, Maniaci, Carroll, Findeiss, and Park and "all of management were on the unit a lot and they watched every movement we made. They followed us to breaks." Respondent contends that the foregoing testimony does not prove it was engaged in surveillance of union activities by management officials. Rather there was an increased presence of management officials in

order to develop a better relationship during the union campaign.

Analysis

I find the evidence is insufficient to establish that Respondent engaged in surveillance of the union activities of its employees in violation of the Act and I shall recommend dismissal of this allegation. As the Respondent points out in its brief, the foregoing testimony of the employees at the hearing was in generalized conclusionary terms. There was no evidence presented of any specific overt act of surveillance engaged in by any of Respondent's management personnel. Much of the testimony of the increased presence of management officials during the campaign was at least as much attributable to Respondent's efforts to persuade its employees that a union was not necessary and to establish better relationships with the employees to the end of their rejecting the Union at the election. The natural consequence of this increased presence by management officials was undoubtedly their greater opportunity to witness what was occurring inside the facility where the employees were working. This however falls short of establishing a violation of the Act. *Carter Hawley Hale Stores,* 267 NLRB 385 (1983); *Well Bred Loaf*, 303 NLRB 1016, 10–18, 19 (1991).

9. Changes in break and lunch procedures and time

This allegation involves changes made in the break and lunch schedules and procedures of the four CNAs known as the restorative aides. Essentially these CNAs performed passive therapeutic and exercise services for the residents designed to keep them mobile and limber and for the "fitness trail" which was a program of active range of motions. Prior to January 1992 they generally all went on breaks and to lunch together. As discussed infra all four of these CNAs signed union cards and three of them Candy Guss, Robyn Weimer, and Tara (Beckman) Smith were open union supporters. CNA Cheryl Wingert had signed a union card CNA Robyn Weimer testified that in January 1992 D.O.N. Jordan told them they would no longer be allowed to take their breaks and lunch at the same time. They asked Jordan why the change was being made and she told them it was because of the new physical therapy group (NOVA) coming to the facility as she wanted one of them available in case they needed help. Smith was required to go first because she started work at 5:30 a.m. to comply with state laws requiring breaks for the CNAs after 4 hours. Weimer continued to take her breaks with the other restorative aides in her department. Lunches were divided among those aides who were on duty that day. Normally she took her lunch with Guss. Some time after the change in lunch schedules Jordan also told the CNAs that they were to tell her or the A.D.O.N., Candy King, or the charge nurse when they were going on break. Prior to these directions by Jordan, they did not report to Jordan, King, or charge nurses prior to going on break and all of the four restorative aides went to lunch together after checking that the physical therapist and the occupational therapist did not need them anymore that day.

Jordan testified she changed the lunch periods and breaktimes toward the end of 1991 and that she announced the change in a staff meeting for CNAs held in November or December 1991. She initially testified that she had made the change to be fair and consistent with the other CNAs and to "make sure that the coverage was adequate so that the residents were being cared for properly." All CNAs assigned to the A and B stations were required to stagger their breaks and were not allowed to all leave at the same time. At that time Jordan also instituted a change by requiring the restorative aides to report to her when they took breaks and contended at the hearing that she did this because she was their immediate supervisor and other CNAs were already required to report to their supervisors prior to taking breaks. Jordan testified that Tara (Beckman) Smith was required to take her break at 10:30 a.m., but she could get lunch from the kitchen as there was a signup sheet for early lunches available to employees. In answer to a question by the General Counsel on cross-examination Jordan testified that NOVA came into the facility about the time the break and lunch schedules were changed. Jordan testified that NOVA was a therapy program under the administrator's jurisdiction and that NOVA care did interact with the restorative aides on a daily basis.

A.D.O.N. Candice King testified that in the summer or fall of 1991 (or possibly later) restorative aides Wingert, Beckman (Smith), Guss, and Weimer told her they did not have enough time to complete their restorative programs so she sat down with them and individually asked them how long it took for each resident's program and she made out a schedule to enable them to complete everything during the day and allowed enough time for them to complete their paperwork. This worked out so that two went at one time and two at another time depending on the time it took to perform their assignments. Since Smith came in early her lunch was scheduled at an earlier time than the other aides. There was a signup sheet on the door to the dietary department and Smith could have signed up for an early lunch tray.

Analysis

I find the evidence is insufficient to establish a violation of the Act. I note the contrasting testimony of D.O.N. Jordan and A.D.O.N. King concerning who made the break and schedule changes, when they were made and the reasons therefor. The General Counsel notes these conflicts in their brief. Respondent does not address the testimony of King in its brief. I credit the testimony of Jordan as the more reliable which is essentially consistent with the testimony of Weimer, Smith, and Karn concerning when the changes were initiated. However, in reviewing that testimony of Jordan I find it is consistent with the business necessity of affording coverage in the therapy area in view of the introduction of the NOVA program and find no evidence that the break and lunch schedule changes and reporting requirements were onerous or unwarranted or unlawfully motivated. Accordingly I recommend that this allegation be dismissed.

10. Alleged disparate enforcement of a rule regarding personal calls

The evidence is uncontroverted that the Respondent by means of an addendum to the employee handbook, initiated a rule change in March 1991, providing for discipline for employees who engaged in personal phone calls while on duty. However, according to the testimony of Administrator Park, the rule was not enforced until the fall of 1991 when Park testified he noted an excessive number of personal phone calls. According to Park he decided to implement a procedure whereby all incoming phone calls were screened to determine if they were of an emergency nature in which case the call would be put through to the employee. All other telephone call messages and numbers were posted on a message board by the timeclock for the employees. In January 1992, Park issued a memorandum to

the employees regarding the availability of "Associate (Employee) Handbooks and Associate Addendums" which included this rule change on personal phone calls. Dorothy Theunick testified that during her employment at the East Moline facility the employees were always permitted to make and receive personal telephone calls while on duty, but that in January 1992, she attempted to call her daughter Robyn Weimer who was then on duty and was told by the receptionist that employees were not allowed to receive personal telephone calls.

Analysis

I find the evidence is insufficient to establish a violation of the Act by the Respondent by virtue of its requiring personal telephone calls to be posted on a message board rather than put through to the employees. Park's testimony as set out above was not specifically rebutted by any employee and I credit it. As the Respondent notes in its brief, Theunick testified on cross-examination that she did not recall a bulletin board at the facility for the placement of notes of personal calls. In the absence of any additional evidence I find that the evidence is insufficient to support a violation of the Act.

11. January 1994 memorandum to staff regarding the "Availability of Associate Handbooks and Associates Addendums"

Facts

Respondent maintains an associate handbook which is routinely given to and reviewed with new employees. On March 11, 1991, Respondent issued an addendum to the handbook. On January 7, 1992, Park issued a memorandum to all staff regarding the "Availability of Associate Handbooks and Associate Addendums." On cross-examination Park was asked why he had posted the memo for the addendum which had been issued a year ago and testified he did so in case employees had lost their copies. He was also asked whether he had done so to remind employees 1 month prior to the election that they would be held responsible for strict compliance with Respondent's rules. He denied that this was the reason for the issuance of the memorandum.

Analysis

I find the foregoing evidence is insufficient to establish a violation of the Act. Park's conduct in issuing the memorandum was lawful in itself and in the absence of any additional testimony that it was utilized to unlawfully threaten the employees, I find no violation of the Act in this instance.

12. Posting of guards outside the ambulance doors during an all-staff meeting held by Respondent the day prior to the election and locking the doors to the firedoors prior to the meeting

Facts

CNA Candy Guss testified that on February 12, 1992, the day prior to the election Respondent held an all-staff meeting to discuss the union campaign. Prior to the meeting she observed guards posted outside of the ambulance door, one guard at the front door to the facility, and she observed Administrator Park lock the fire doors. CNA Tara (Beckman) Smith testified that she observed guards at the ambulance entrance. CNA Laura Karn testified that on February 13, 1992, the day of the election, she observed a guard posted at the ambulance entrance door.

Analysis

I credit the testimony of Guss as supported in part by Smith and Karn as set out above and find that Respondent violated Section 8(a)(1) of the Act by the posting of guards at the entrance and the locking of the fire doors as there has been no evidence of a demonstrated need for this action. Rather I find this action was taken to disparage the Union and intimidate its supporters. Although I have found above that the Respondent did not violate the Act by hiring guards to patrol the parking lot in view of vandalism to automobiles that had been reported to the supervisor, I find that the posting of the guards at the entrance and the locking of the fire doors was not justified as this record does not support any inference that violence or even open hostility between prounion and antiunion employees had occurred or that any vandalism or sabotage to the facility or any threat to the welfare of the residents or their visitors existed. *Sheraton Hotel Waterbury*, 312 NLRB 304 fn. 3 (1993).

13. Requiring off-duty employees to produce identification before being permitted to enter the facility on the day of the election

Facts

On February 13, 1992, the day of the election the Respondent instituted a new procedure of posting guards at the ambulance entrance and requiring identification of employees prior to permitting them to enter the premises by this entrance as testified to by CNA Guss and CNA Watson who was refused entrance through the ambulance entrance and directed to another door some distance away. This procedure had been instituted by Respondent without notice as acknowledged by Administrator Park.

Analysis

As in the preceding section concerning the posting of guards, I find that this action was violative of Section 8(a)(1) of the Act as unlawful disparagement of the Union and its supporters constituting interference with the Section 7 rights.

14. On or about February 6, 1992, more strictly enforcing a work rule regarding campaigning in resident areas against employees believed to be union supporters

Facts

This allegation apparently involves the issue of permitting employee Jerry Davis to wear a heart-shaped billboard saying "have a heart, vote no for the Union" and the alleged refusal to permit Dorothy Theunick to wear a union button at her workstation or in working areas. Theunick's testimony in this regard was less than clear as she did not identify who had prohibited her from wearing a union button. However, as contended in Respondent's brief all of the employees who testified concerning the wearing of buttons testified that they were not prohibited or restrained from wearing buttons by members of Respondent's management. Cheryl Wingert testified she wore a "vote yes" button in the hallways of the facility, but decided not to wear her button while working. She observed other employees wearing "vote yes" buttons in the facility including in the presence of residents. Candy Guss, Connie Hess, Sandra Ewing, and Laura Karn all testified they wore their prounion buttons on a selected day when all prounion employees wore a union button throughout the facility and without interference from management. Tara (Beckman) Smith testified she wore her union button for several weeks prior to and up to the election. Ma-

niaci and Carroll testified that union buttons were worn by employees without interference.

Analysis

I credit the testimony of the listed employees above and Maniaci and Carroll in this regard that union buttons were worn by employees without interference by management through the facility including in resident areas. I find the testimony of Theunick was not specific as to the instance when she testified she was prohibited from wearing a button and find at most that this would have been an isolated incident. Accordingly I find that the evidence presented is insufficient to establish a violation of the Act and will recommend the dismissal of this allegation.

15. Alleged surveillance of employees engaged in by Director of Nursing Stephanie Jordan on the day of the election by following them throughout the day including times when they were going to the polling areas to vote

Facts

Laura Karn testified that on the day of the election D.O.N. Jordan followed her and Mamie Terry throughout the day and on one occasion when they were walking up the hallway to vote asked them where they were going. Karn told her they were going to vote and Jordan told them she would walk them there. Terry did not testify. Robyn Weimer testified that Jordan did not normally supervise her but that on the day of the election Jordan helped her pass ice water, clean the utility room, and pick up in the dining room. She also testified that Jordan paged her on a couple of occasions that day. Jordan testified that during the election Respondent's management was prohibited from going near the station A area as the voting area was located near there. This restricted area encompassed half of the facility and included her office so she was unable to go to her office which resulted in her being in the other half of the facility which included the restorative department which was under her supervision. Jordan is no longer with Respondent as she accepted an offer to go to another facility.

Analysis

I credit the testimony of Jordan which was unrebutted. Even accepting the testimony of Karn and Weimer as accurate, I find no violation under these circumstances as there is no evidence that Jordan was engaging in any improper activities and her increased presence was readily explained by her restriction from one-half of the facility. I find no violation herein.

B. The Alleged 8(a)(1) and (3) Violations

1. The alleged unlawful suspension and discharge of employee Dorothy Theunick

It is undisputed that Dorothy Theunick was one of the most vocal and ardent union supporters having initially obtained a recommendation of which union to contact, having had the initial union meeting at her home and having solicited the greatest number of union authorization cards and being one of the most outspoken critics of the Respondent's position at its captive audience meeting held shortly after Respondent became aware of the Union's demand for recognition. As a 20-year employee ostensibly her value to Respondent as an employee was unquestioned and she had no prior disciplinary record. However in February 1992, she was off work on sick leave February 2, 3, 4, and 5 (February 5 was her normal day off). Under Respondent's absenteeism and sick leave policies, employees who are off work sick for 3 or more consecutive days are required to present a doctor's excuse upon their return to work. On February 6, D.O.N. Jordan called Theunick at the public high school where she worked during the day and asked her if she was coming to work that evening as Theunick worked the evening shift from 4 p.m. to 11 p.m. and was scheduled to work that evening. Theunick answered in the affirmative. Theunick testified at the hearing that Jordan reminded her of the rule that employees absent 3 or more consecutive days are required to bring in a doctor"s excuse. Jordan testified that she had called Theunick for scheduling purposes and denied having brought up the need for a note. I credit Jordan. Theunick testified she was unable to obtain an appointment with her doctor as he was off that day and took an old medical diagnosis from the preceding August and changed the date and wrote in an additional diagnosis and presented it on February 6 to A.D.O.N. Candice King. King testified she noted a misspelling of a medical term (upper "respiratory" infection) and what appeared to be a change in date on the form. It was developed at the hearing that the dates of August 12, 1991, and August 14, 1991, were changed to look like February 3, 1992, and February 6, 1992. King presented this discrepancy to Administrator Park who directed King to check this out. King was unable to reach the doctor on that day, but contacted the doctor's office the next day (February 7) and his nurse Pattie Thiem confirmed that Theunick had not been there on that date. King and Park then met with the doctor at his office on February 7 and confirmed with him personally that he had neither seen her nor written the excuse for her. Theunick was then confronted with this in a meeting with Park and King on February 7 and she contended the excuse was genuine and she also offered to obtain another medical excuse. Park said it was not necessary. Theunick was then suspended pending a decision on possible termination by Park at that meeting for violating Respondent's rule against "falsifying reasons for absence from work" a type B infraction with the penalty ranging from a "final conference" warning to suspension and/or discharge for the first offense. Theunick was also in violation of Respondent's rule against "cheating, fraud or dishonesty . . . and its rule prohibiting" misrepresentation of a material fact in an attempt to obtain a benefit or advantage both type A infractions "which warrant immediate suspension and discharge when the review establishes it is appropriate, even though no prior counselings are in effect." Theunick contacted Park on February 10 by telephone and told him she wanted to turn her uniform in and asked for her final paycheck. Park contended at the hearing that he considered her to have resigned by this action although he acknowledged that she did not say that she was resigning. A day later Theunick brought in her uniform and was met by Park who refused Theunick's offer of another note. Theunick protested this. She has not been reinstated.

The General Counsel contends that Theunick was discharged because of her engagement in protected concerted activities as a leading union adherent and supporter and argues that the request for the note from Theunick by Jordan was part of the unlawful harassment of Theunick, that Park's position that she had resigned was pretextual, and that the discharge of Theunick was in conflict with its longstanding policy that associates with 10 or more years of tenure may not be terminated without a prior review by Respondent's president and chairman. The Respondent contends that Theunick's testimony shows she

falsified the note and attempted to disguise this in the meeting with Park and King and that Respondent may lawfully discharge her for such an infraction. Respondent argues further that there is no evidence of disparate treatment as there was no prior case of such an infraction by another associate at the East Moline Care Center.

Analysis

I find that the General Counsel has failed to establish a prima facie case of a violation of the Act by the suspension and discharge of Theunick. Assuming arguendo that a prima facie case was established, I find that it has been rebutted by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); *NLRB v. Transportation Management Corp*., 462 U.S. 466, 470 (1983); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). In making this determination, I find that the animus of Respondent toward the Union has been established as has Respondent's knowledge that Theunick was a vocal union supporter who incurred the ire of Findeiss at a captive audience meeting leading up to his unlawful threat to sell the facility rather than permit it to be organized by a union. However, under the circumstances, I do not find unlawful the action taken against Theunick for her falsification of the medical excuse and her attempt to conceal her actions from the employer. Although I recognize the actions taken by the employer against a 20-year employee may appear harsh, Respondent's actions in this regard are fully warranted by its rules spelling out the penalty for such infractions. It may well be that Respondent welcomed the opportunity to rid itself of a leading union supporter. However, I find that its actions are consistent with of the business reasons encompassed by its policies. I find the Respondent has established by the preponderance of the evidence that it would have discharged Theunick even in the absence of her concerted activities on behalf of the Union and will recommend the dismissal of these allegations.

2. The alleged unlawful suspension and discharge of employees Robyn Weimer, Candy Guss, Tara (Smith) Beckman, and Cheryl Wingert

The record establishes that these four employees were CNAs assigned to Respondent's restorative unit who provided therapy and exercise to the residents in order to assist them in their range of motion and maintenance of mobility. As part of their duties the restorative aides were required to document on preprinted forms what had been done for each resident. These aides testified that as a result of the press of time they were unable to complete this paperwork. It is undisputed that the paperwork is required by the state to verify that the therapy has been given to the residents and to serve as a basis for calculating payouts made by the state to the facility for the treatments.

In February 1992, CNA Candy Guss was on light duty as a result of an injury and she was assigned to help in completing the paperwork for all of the CNAs in the restorative department. She testified that she merely guessed at who had done what and for which residents and filled in the blanks. It is undisputed that the other restorative aides were aware that this was going on. A.D.O.N. Candice King testified that in February 1992 she noticed a number of discrepancies on the "fitness trail" therapy programs wherein some of the restorative CNAs were shown as having provided therapy to residents on dates when they (the particular CNAs) were not working. On further investigation she determined that some of the residents listed as having been provided therapy had not received such therapy. Her review showed that these discrepancies occurred over a 2-week period. This was reviewed with Administrator Park who along with D.O.N. Jordan met with Weimer, Guss, Smith, and Wingert separately and suspended them pending possible termination. On March 19, 1992, Respondent discharged these four employees for falsification of records (a Type A infraction of Respondent's rules resulting in suspension or immediate discharge.) At the end of the hearing the General Counsel and Respondent stipulated that Weimer and Guss had filled in the blanks without utilizing underlying documentation and that all four of the restorative aides were aware of this action.

The General Counsel produced several witnesses who testified they had been routinely told by D.O.N. Jordan and other members of management to fill in the blanks and had on occasion been assigned to fill in the blanks for other CNAs in other areas. Jordan denied having used that phrase. From this the General Counsel argues that D.O.N. Jordan and Respondent's management were condoning and even fostering the false reporting of treatments for patients which had not been performed in order to keep up and ostensibly satisfy state requirements for documentation which would result in the Respondent's facility receiving funds for therapy which had not been administered. The Respondent contends that the testimony of the CNAs attempting to lay the responsibility on management is fraught with self-interest in retaining their jobs and that the testimony of the other CNAs who were not involved in this matter such as Karn and Partain is unworthy of belief.

Analysis

I find that the General Counsel has not established a prima facie case of a violation of the Act by the suspensions and discharges of Weimer, Guss, Smith, and Wingert. Although the Respondent's animus toward the Union has been established by the violations found with respect to the East Moline Care Center and Respondent's knowledge that Weimer, Guss, and Smith were leading union supporters has also been established. I find that the evidence does not support the conclusion that the suspension and discharge of these employees was other than a legitimate response to a violation of Respondent's rules and procedures. Assuming arguendo that a prima facie case has been established, I find it has been rebutted by the preponderance of the evidence. *Wright Line*, supra; *NLRB v. Transportation Management Group*, supra; and *Roure Bertrand Dupont Corp.*, supra; and that the Respondent has established it would have discharged these employees even in the absence of their engagement in union activities.

Initially, I credit the testimony of Jordan that she did not direct the CNAs to falsify the reports. Even if she had used the phrase, "fill in the blanks" when referring to the paperwork, I find it is a long stretch to move from this statement to directing the CNAs to falsify the reports. No witness testified that there was ever an explicit direction to falsify the reports. I also find it most unlikely that a director of nursing would be motivated to direct the employees under her direction to falsify reports given the ultimate possibility of discovery with possible civil and criminal liability as well as the loss of her nursing license. Thus I do not find that Respondent's actions in addressing this issue by suspending and discharging the restorative aides for either their participation or complicity in the falsification of records were violative of the Act. I have also reviewed the termination of employee Michell Hearn in November 1991 for falsification of records for signing the name of a resident's family member to a care plan document and find it supports Respondent's posi-

tion. I have also reviewed the written warning "final conference" issued to CNA Donita Sliniger on March 19, 1992, the same day the alleged discriminatees were discharged. However, this involved a single incident for which the Respondent accepted the CNAs explanation that she had filled in the blanks based on her interpretation of a charge nurse's statement to her to catch up the charts because Jordan wanted them filed. On this occasion the Respondent's management (D.O.N. Jordan, A.D.O.N. King, and Administrator Janet Littrell) noted in the disciplinary form that this intermediate step was being taken as a result of possible inadequate instruction from the supervisor. This, however, appears to have been a single incident. While this is somewhat supportive of the General Counsel's position, I do not find that it is entirely inconsistent with Respondent's actions taken against the discriminatees in this case. I thus will recommend the dismissal of these allegations.

C. The Objections to the Election

Pursuant to a Stipulated Election Agreement approved by the Regional Director of Region 33 of the National Labor Relations Board on January 21, 1992, the election was conducted on February 13, 1992, among employees in the following appropriate unit within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time housekeeping aides, dietary aides, certified and non-certified nursing assistants, central supply employees, dishwashers, cooks, rehabilitation aides, medical records assistant, activities assistants, maintenance aides, and laundry aides employed by the Employer at its East Moline, Illinois, facility; but excluding the administrator, director of nursing, registered nurses, licensed practical nurses, social services director, activities director/coordinator, program coordinator, dietary manager, housekeeping supervisor, business office manager, medical records director, bookkeeper, maintenance supervisor, office clerical employees and guards, professional employees and supervisors as defined in the Act.

There were 93 eligible voters with 87 valid votes counted and 2 challenged ballots. There were 34 votes cast for the Union and 53 votes cast against the Union. The challenged votes were not sufficient to affect the election. On February 19, 1992, the Union filed 33 objections to the results of the election in Case 6–RC–10752 (formerly 33–RC–3724) which were consolidated for hearing with the hearing in Case 6–CA–22084–29 (formerly 33–CA–9145) by the Regional Director of Region 6 of the National Labor Relations Board. At the hearing in these cases involving the East Moline Care Center, no evidence was presented with respect to Objections 6, 8, 10, 15, 17, 23, 24, 25, 27, 28, 29 and 31 and these objections are accordingly overruled.

Objection 1. "*The employer and his agents threatened discontinuance of privileges or benefits presently enjoyed if the employees went Union. They also promised special perks for voting no.*"

This apparently refers to a statement attributed to Administrator Park by Robyn Weimer that "We don't want a union in here. It would stop our open door policy." Weimer's testimony in this regard was unrebutted and I credit it. However, I find this statement was a nonobjectionable opinion of the consequences of the advent of a union as viewed by Park, particularly the risk of unlawful direct dealing by an employer if the employer bypassed a designated bargaining representative in adjusting grievances or engaged in direct bargaining with employees in the unit. Additionally this objection appears to address the issue of the raffles of groceries for answering the employer quiz and the award of prizes for voting in the election which I have previously found were not violative of the Act in this decision. There was no evidence presented of any management representative promising "special perks for voting no." I thus shall recommend that this objection be overruled.

Objection 2. "*The employer and his agent used intimidating language designed to influence employees in the exercise of their right to belong to the Union.*" **Objection 5.** "*The employer and his agents threatened that if the Union came in they would sell the place.*" As I have found that Respondent violated Section 8(a)(1) of the Act by Director of Associate Relations Robert Findeiss' threat to sell the East Moline Care Center if the Union was successful in the election, I shall recommend that these objections be sustained.

Objection 3. "*The employer and his agents threatened and actually suspended an employee because of her Union activities.*" This objection apparently refers to the suspension of Dorothy Theunick. As I have found that the Respondent did not violate the Act by its suspension and discharge of Dorothy Theunick, I shall recommend that this objection be overruled.

Objection 4. "*The employer and his agents threatened through a third party acts of interference*." **Objection 16.** "*The employer and his agents prevented employees from soliciting Union membership during their free time on the inside of the nursing home premises, threatened and called the police when they solicited outside*." As I have found Respondent violated Section 8(a)(1) of the Act by threatening to call the police when the employees engaged in the distribution of union campaign literature at the entrances to the building I shall recommend that these objections be sustained. I do not however find any support in the record for that portion of Objection 16 alleging that employees were prevented from soliciting union membership during their free time inside the premises.

Objection 7. "*The employer and his agents conducted themselves in ways that indicated to employees that they were being watched to determine if they were participating in Union activities.*" As I have recommended the dismissal of the complaint allegation of surveillance, I recommend that this objection be overruled.

Objection 9. "*The employer and his agents prejudicially changed the shifts and schedules and work duties of those actively supporting the Union.*" As I have recommended the dismissal of the alleged underlying violation of the Act, I shall recommend that this objection be overruled.

Objection 11. "*The employer and his agents asked employees for an expression of their thoughts about the Union*." **Objection 12.** "*The employer and his agents asked employees how they intended to vote in the Union Election.*" **Objection 13.** "*The employer and his agents asked employees whether they signed a Union card.*" **Objection 14.** "*The employer and his agents asked employees about who was participating in the Union.*" **Objection 19.** "*The employer and his agents asked about the identity of the leaders of employees favoring the Union*." As I have found that the interrogation of CNAs Laura Karn and Mamie Terry by Maniaci and Hankley concerning who had started the Union was unlawful, I recommend that Objections 11, 13, 14, and 19 be sustained. As I have found that the interrogation of Karn and Terry by Bowers as to whether they were going to vote for the Union was violative of the Act,

I shall recommend that Objections 11 and 12 be sustained on the basis of this violation also. Although I have found that Respondent violated the Act by Findeiss' interrogation of Weimer as to who had signed a union card, this did not take place during the critical period and I do not rely on this for consideration of Objection 13.

Objection 18. "*The employer and his agents assisted employees to withdraw Union membership cards*." This refers to two memos dated January 10 and 16, 1992, that Administrator Park circulated to the employees. In the January 10 memo, Park states that "we have been told that a number of employees have decided to revoke their authorization cards. Unfortunately the Union has publicly stated the names of these employees and tried to threaten them." He further criticizes the Union for this conduct and threatens to file charges with the National Labor Relations Board if this conduct does not stop. In the January 17 memo, Park notes that "some associates have expressed interest in asking for the return of their authorization cards. If you have signed a card and changed your mind, send a letter which says: 'I hereby revoke my card, please return my authorization card to me.'" The memo then lists the address of the Union. On the last line of the memo, Park states, "Remember to vote on February 13 and please vote 'No'!!" Park testified that two employees (only one of whose name he could remember (Sharon Palmer) told him they had signed a card and wished to revoke it. He also testified that a "couple"of employees (whose names he did not recall) approached him and asked how another employee had found out they had signed a card. I credit Park's unrebutted testimony in this regard. Under the circumstances of these facts and in the absence of any additional evidence of assistance or solicitation to revoke their authorization cards I find that Park's memos did not constitute objectionable conduct and will recommend that this objection be overruled. *Tartan Marine Co*., 247 NLRB 646, 655–656 (1980); *Peoples Gas System*, 275 NLRB 505, 507–508 (1985).

Objection 21. "*The employer and his agents met employees at the home on their way in to vote in the election.*" As I have found the employer's posting of guards at the entrances and the requiring of employees to show identification to enter the premises on election day to be violative of the Act, I shall recommend that this objection be sustained.

Objection 22. "*The employer and his agents campaigned against the Union in patient care areas.*" **Objection 26.** "*On election day while the polls were open a managerial employee was in her office with the door open in full view of all employees coming into vote and yelling 'remember to vote no.' The employer and his agents walked the halls in the direct path of the voting area and escorted people to vote. A third party person harassed certain voters on their way into the polls from the outside.*" **Objection 30.** "*The employer and his agents permitted anti-union employees free rein to campaign any time or any place even in patient care areas and denied prounion employees the same.*" **Objection 32.** "*The employer and his agents defaced the official sample ballot and gave the impression to the employees that the Labor Board wanted them to vote no.*" **Objection 33.** "*The employer and his agents gave the employees the impression they were the ones setting up and conducting the election.*"

As I have found that the Respondent permitted its antiunion employees to put campaign literature throughout the facility in violation of its rule prohibiting this practice by employees, I shall recommend that Objections 22 and 30 be sustained. With respect to Objection 26, employee Candy Guss testified that on election day as she and Tara (Beckman) Smith were leaving the polling room after having voted, they passed Assistant Administrator Janet Littrell's office who yelled "Vote No" as they passed her office. Guss answered, "I voted Yes." I credit the testimony of Guss which was unrebutted as Littrell did not testify. However, I find this to be an isolated incident and it occurred after Guss and Smith had voted and there is no objective evidence that under the circumstances this would have tended to affect the results of the election. I accordingly shall recommend that Objection 26 be overruled.

With respect to Objection 32 Laura Karn testified that in February 1992, Maniaci came and called her "off the floor" and took Debbie Kipp (head of Social Services) with them to a staff room where there was a voting booth and commenced to explain to them what would happen on election day and handed them a ballot with a red "X" marked in the "No" box. Karn asked Maniaci if he was to trying to encourage them "to vote no and he chuckled" and replied in the affirmative. It is clear that under the circumstances there was no objective evidence that the altered ballot was likely to give Karn the impression that the Board favored a no vote in the election. *SDC Investment*, 274 NLRB 556 (1985); *BIW Employees Federal Credit Union,* 287 NLRB 423 (1987). This also appears to be the incident referred to in Objection 33. Accordingly, I shall recommend that Objections 32 and 33 be overruled.

In summary as no evidence was presented with respect to Objections 6, 8, 10, 15, 17, 23, 24, 25, 27, 28, 29, and 31, I recommend that those objections be overruled. I recommend that Objections 1, 3, 7, 9, 18, 26, 32, and 33 be overruled for lack of merit. I find that Objections 2, 3, 5, 11, 12, 13, 14, 16, 19, 20, 21, 22, and 30 have merit and recommend that they be sustained. Accordingly I recommend that the election be set aside.

D. The Alleged Refusal to Recognize and Bargain with the Union

Facts

The complaint alleges that the Respondent has since December 24, 1991, failed and refused to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit as set out above in violation of Section 8(a)(1) and (5) of the Act. The record establishes that on December 23, 1991, several employees made a request to Administrator Park that the Respondent recognize the Union and informed him that the Union had obtained authorization cards from a majority of the employees in the unit. Union President Alice Bush solicited 11 authorization cards which were signed by members of the in-house organizing committee. Employees Guss, Karn, Partain, Smith, Theunick, and Weimer solicited 46 authorization cards thus resulting in a total of 57 cards out of a total of 103 employees in the unit on which the request for recognition was based. The record bears out that each of the 57 cards was authenticated and was a valid unambiguous card. There was no evidence of any misrepresentation, fraud, or duress involved in the solicitation of these cards. At the time of the request for recognition Administrator Park told the employees that they needed to talk to their union representative and rejected the demand for recognition. The Union filed the petition for an election the next day which was set for February 13, 1992, as of which date there were 92 employees in the unit. Theunick had been terminated shortly prior to the election. Thus as of the election the Union

Thus as of the election the Union maintained a majority status based on the authorization cards. Immediately after the demand for recognition the Respondent commenced its antiunion election campaign which was punctuated by the unfair labor practices found herein. Under these circumstances, I find that the Union had a clear majority of the unit employees at the time of the demand for recognition and maintained this majority until the date of the election which I am recommending be set aside as the result of the objections which were sustained above.

Analysis

I accordingly find that the Respondent violated Section 8(a)(1) and (5) of the Act by its refusal to recognize the Union based on the valid authorization cards obtained by the Union from a majority of the employees in the unit and its coextensive utilization of this refusal as a stalling device to enable it to engage in a series of unfair labor practices designed to erode the majority support for the Union. Under these circumstances I find a bargaining order is the proper remedy for the unfair labor practices and the violation of Section 8(a)(1) and (5) of the Act which eroded the majority support for the unit so as to render the possibility of a fair election to be slight. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). See also *Cumberland Shoe Corp.,* 144 NLRB 1268, enfd. 351 F.2d 917 (6th Cir. 1975); *Levi Strauss & Co*., 172 NLRB 732 (1968); *Sheraton Hotel Waterbury*, supra.

E. Ridgewood Court Nursing Home Located in Attleboro, Massachusetts 6–CA–25548–1 (formerly 1–CA–29418)

Statement of the Case

The charge in this case was filed by Service Employees International Union, Local 285, AFL–CIO, CLC (the Charging Party, Local 285, or the Union) on June 1, 1992, and a first amended charge was filed by the Charging Party on July 28, 1992.

The complaint alleges that on or about May 13, 1992, Respondent gave its employee Patricia Chace a negative performance evaluation and on or about June 8, 1992, changed Chace's duties by requiring her to appraise the performance of another nurse employee, that Respondent engaged in the aforesaid conduct because the employees of Respondent formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities and that Respondent thereby violated Section 8(a)(1) and (3) of the Act. The complaint further alleges that Respondent also engaged in the aforesaid conduct because Chace testified at a representation hearing before the Board in Case 1–RC–19812 and that Respondent thereby violated Section 8(a)(1) and (4) of the Act.

The Respondent denies the commission of the aforesaid alleged unfair labor practices.

Facts

Patricia Chace is a registered nurse and has been employed by Respondent at the Ridgewood Court Nursing Home in Attleboro, Massachusetts, since May 1989. She has been a charge nurse since almost the inception of her employment. As a charge nurse she was assigned to the Medicare unit on the first floor of the facility which was used for short-term acute care patients. Two other nurses were assigned, one each at the two ends of the first floor. Chace was responsible for overseeing the paperwork and documentation required on the entire first floor and for overseeing the work of the two other nurses and the certified nurses aides who work on the floor. In July 1991, Chace was offered the newly created position of "head nurse" for the floor, and signed a job position guide description for which she had received an increment in pay of 50 cents per hour. The job description for the "head nurse" provides in part that she was responsible for providing feedback to nonprofessional and professional employees. The facility has had substantial turnover of its directors of nursing and assistant directors of nursing. Julia Love became the director of nursing in February 1992, and resigned to take another position in November 1992. Prior to Love's tenure the position had been vacant for some time and was occupied for a period of time in early 1992, by Nursing Consultant Lorene Delfino on an acting basis. According to Love's testimony during her tenure she attempted to tighten up and improve standards of nursing care to residents and recordkeeping to correct what she perceived to be noncompliance with state regulations and Respondent's company policies. During this period the nurses and nurses aides made a "march on the Boss" to the facility administrator along with union organizer Michael Fadel and presented him with a petition for recognition signed by virtually all of the registered nurses, and licensed practical nurses. The certified nurses assistants (CNAs) were already represented by the Union in another bargaining unit. An election was directed by the Regional Director following a representation hearing held on May 8 and 9, 1992. An election was held on July 26, 1992, and the employees voted 20 to 2 in favor of union representation.

Against this background is presented the allegation involving alleged discrimination against Chace who was one of the nurses who signed the petition and testified at the representation hearing in favor of an election and the nurses inclusion in the unit with the chief issue in that hearing being whether certain of the nurses performed supervisory duties so as to be excluded from the unit. Chace's testimony generally supported the Union's position. D.O.N. Love also testified in support of Respondent's position that the nurses in question performed supervisory duties so as to require their exclusion from the unit. Ultimately the charge nurses and head nurses including Chace were included in the unit.

On one occasion in June 1992, Love told Chace to evaluate a licensed practical nurse (Judy Harrop) on her floor as Chace was the head nurse in charge of nursing activities on the floor. Love testified that although she asked Chace to evaluate the nurse, Chace never did so. Love took no action against Chace for her refusal to do so. At the hearing Chace testified she had not previously been required to rate other nurses and appeared to draw a distinction between rating nurses and CNAs which she had previously rated while working under a charge nurse job description which listed as a responsibility, the evaluation of other employees. She testified she was uncomfortable in rating her fellow nurses although she acknowledged that she had voluntarily undertaken the job of charge nurse on the floor and signed the job description therefor for which she received the increment in pay.

The other allegation involving Chace is that she received an unfavorable evaluation because of her engagement in concerted activities. In March 1992, Chace was due for her annual review which was normally accompanied by a raise in pay. As the position of director of nursing had been vacant some time before she asked Love for an evaluation which would normally have been performed by the director or assistant director of nurses. Love testified she told Chace that she had not been

there long enough to observe all aspects of Chace's work, but agreed to rate Chace. Following the election after several requests by Chace, Love rated her as meeting minimal requirements a ("2" in a 4-point rating system) whereas Chace had previously been rated higher in prior evaluations. There were several areas of the evaluation form that Love was unable to complete as a result of her own relatively short tenure on the job. Love testified that she had problems with getting Chace to assume her own authority and take responsibility as head nurse of the first floor by dealing with the nurses and certified nurses aides for whom she was responsible and that Chace often called on Love to take charge rather than resolve the problems herself. Chace testified she attempted to resolve the problems but that the other nurses and the CNAs would not do what she told them. Prior to this evaluation Chace had received more favorable evaluations in the past. However, there were notations on several prior evaluations concerning the need to take more responsibility for dealing with the other nurses and aides under her charge and to delegate tasks. Nurses Consultant Delfino who occupied the position of director of nurses on an acting basis in early 1992 testified that from her past observations of Chace's performance viewed from both of her prior positions, as acting D.O.N. and as a consultant to the home that Chace was a very caring nurse, but had difficulty in taking charge of other nurses and aides on her floor and also had difficulty in properly completing all documentation in the required length of time.

Analysis

Since the hearing in this case the Supreme Court issued its decision in *NLRB v. Health Care & Retirement Corp. of America,* 114 S.Ct. 1778 (1994), holding that individuals whose authority would otherwise make them supervisors are not to be classified as "employees" under the Act by an interpretation of the phrase "in the interest of the employer." Under the facts of the instant case and mindful of the foregoing Supreme Court decision I perceive no violation of the Act by Love's request of Chace that she evaluate the nurses on her floor over whom she was in charge by virtue of her position as a "head nurse" and in accordance with the duties and responsibilities covered by the "head nurse" position which she signed and for which she received an increment in pay. I find that the Respondent did not violate the Act by telling Chace to evaluate LPN Judy Harrop.

I further find that Love's testimony and that of Nursing Consultant Defino should be credited and find no violation by reason of the evaluation given to Chace which left several areas open as Love was unable to observe them as a result of her brief tenure and lack of opportunity to observe all aspects of Chace's job performance and as a result of unfavorable comments by Love concerning Chace's difficulty in taking charge of other nurses and certified nursing assistants under her charge and her referral of many of these personnel matters to Love rather then resolving them herself and her failure to adequately complete her paperwork in the allotted time on her shift. I shall therefor recommend the dismissal of these allegations in the complaint. Based on the evidence before me I find that the General Counsel has failed to establish a prima facie case of a violation of Section 8(a)(3) and (4) of the Act. Assuming arguendo that a prima facie case was established, I find it has been rebutted by the preponderance of the evidence. *Wright Line*, supra; *Roure Bertrand*, supra.

F. West Haven Nursing Facility Located in West Haven, Connecticut 6–CA–25548–4 (formerly 34–CA–5652)

Statement of the Case

The charge in this case was filed by New England Health Care Employees Union, District 1199/SEIU, AFL–CIO (the Charging Party, District 1199, or the Union) on April 14, 1992, and a first amended charge was filed in this case by the Charging Party on May 18, 1992.

The complaint alleges that since about February 1, 1992, Respondent increased the number of disciplinary warnings issued to its employees because the employees of Respondent assisted the Union and engaged in concerted activities, and to discourage employees from engaging in union activities and that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

The complaint also alleges, Respondent admits, and I find that the following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and maintenance employees, employed by the Employer at its West Haven, Connecticut, facility including nurses, laundry workers, maintenance employees; but excluding watchmen, office clerical, professional, confidential, executive and managerial employees, recreation director, students, and part-time employees who work less than eight (8) hours per week, temporary employees, all other employees, guards and supervisors as defined in the Act.

The complaint further alleges, Respondent admits, and I find that since about 1969 and at all times material herein, the Union has been the designated exclusive collective-bargaining representative of the unit and since that date, the Union has been recognized as such representative by Respondent, and that such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period March 12, 1992, through November 1, 1995, and that at all material times since 1969, based on Section 9(a) of the Act, the Union has been the exclusive representative of the unit.

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by the following conduct:

(a) Since about February 1, 1992, Respondent changed the break schedule of employees in the dietary department, a mandatory subject of bargaining, and did so without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

(b) About mid-March 1992, on March 26, 1992, and on April 9, 1992, orally, and about May 3, 1992, in writing, the Union requested that the Respondent furnish it with copies of all disciplinary warnings issued to employees since the hours cutback in the dietary department. The complaint alleges that the requested information was necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of the unit and that from about mid-March 1992, to about May 19, 1992, Respondent failed and refused to furnish the Union with the requested information.

The Respondent has denied the commission of any violations of the Act.

Facts

On December 11, 1991, the Respondent's administrator of its West Haven Nursing home, Robert Haswell, notified the

Union by letter of the Respondent's intent to reduce the hours of the unit employees in the dietary department. The parties met in January and February 1992, to discuss the changes and the Respondent implemented the changes on February 14. In so doing it also changed the break schedules of the employees in the dietary departments on February 14 without bargaining the change in the break schedules with the Union. Commencing on February 23 all nursing home employees including nurses and certified nursing aides and dietary and other employees ceased working overtime in order to protest the reduction in hours in the dietary department. The reduction in hours is not alleged as a violation and was implemented after bargaining with the Union concerning it and in the absence of the Union's agreement as the Union took the position that the reduction would cause understaffing in the dietary department. In late February 1992, the director of nurses, D.O.N. Susan Briggs, began issuing a number of disciplinary warnings to certified nurses aides (CNAs) under her supervision. She testified that she had told Administrator Robert Haswell that she intended to do so as a prior audit of a year ago had shown the nursing department was deficient in several areas including safety, patient care, and human dignity issues. Specifically she noted that there were recurrent problems wherein patients' call bells were not placed within their reach so as to permit them to call for assistance, patients who were required to be restrained were left for long periods of time rather than being released at least every 2 hours as required, patients were not timely changed, patients were not changed and bathed and attended to in private by closing a privacy curtain around the bed when they were being attended to and doors were not closed when patients were taken to the bathroom. Additionally nurses aides were taking breaks in patients' rooms. Briggs testified that there had been numerous counselings concerning these items since the last audit, but that although there had been improvement, she noted that in February 1992, the nursing employees seemed to be disregarding these items. She told Administrator Robert Haswell that she intended to issue a number of warnings to remedy the situation and he agreed and she did so commencing in late February 1992, and continuing until mid-March 1992 Briggs testified there was a marked improvement in the nursing staff's attention to these matters as shown by a full audit of the nursing home rendered in June 1992 at which the rating of the individual nursing service categories improved from ratings in the 70 percentiles a year earlier to ratings in the 90 percentiles. She testified that she was not aware of the nurses' and nurses aides' refusal of overtime at the time she initiated these warnings.

Following the reduction in hours in the dietary department there was friction between the employees and management. Respondent's administrator, Haswell, and its acting dietary supervisor, John Campbell, contended at the hearing that the employees were deliberately slowing down their work as a result of their dissatisfaction with the reduction in hours. Consequently, Respondent's management issued warnings to the dietary employees which are also alleged as violative of the Act.

Following the issuance of the warnings to the nursing staff, the warnings received by the staff were ripped up and placed under the administrator's door. Union Business Agent Leslie Frane testified that she requested copies of the warnings orally of Respondent on three occasions and in writing in her letter of May 3. On the first occasion she did so in a meeting in the second week of March 1992 between herself, and Robert Haswell and Haswell told her to get them from the employees who had ripped them up as he had already furnished them to the employees. In a second meeting between Frane and Haswell held in late March and also attended by Respondent's human resource representative, Jay Begley, Haswell contended he did not have the clerical help to furnish them and Begley interrupted to say they would be furnished as Respondent had a responsibility to furnish them. At a third meeting on another matter on April 7 between Haswell and Frane also attended by Begley, Frane again said she wanted the warnings and Begley said they would be faxed. On a subsequent visit to the facility a few days later Haswell gave Frane six warnings. Frane told Haswell there were substantially more than six warnings and demanded all of them. Haswell told her he did not have sufficient clerical help to comply. Frane reduced her request to writing by her letter of May 3 to Haswell and the Union filed the underlying charge with the Board. On May 11, Respondent supplied the 74 warnings by its letters to the Union.

Analysis

I find the Respondent did not violate the Act by the increase in warnings issued by Director of Nursing Susan Briggs and her supervisory staff commencing in February 1992, and phasing out in March 1992. I credit Briggs that she was unaware of the refusal of overtime until after she commenced to initiate the warnings. I note there was no evidence presented that any of the warnings were improperly issued. Union Delegate Mildred Washington testified she received a warning for drinking a soft drink in a patient's room but this does not give rise to a violation. Assuming arguendo that the General Counsel established a prima facie case that the warnings were issued in retaliation for the refusals of overtime, I find this case has been rebutted by the preponderance of the evidence and that the Respondent would have issued the warnings even in the absence of the employees' engagement in concerted activities. *Wright Line*, supra; *Roure Bertand,* supra.

I also find that the Respondent did not violate the Act by the issuance of warnings to the dietary department employees for what was perceived to be a deliberate slowdown in the performance of their work as slowdowns on the job are unprotected activities. Assuming arguendo that a prima facie case has been established, I credit the testimony of Acting Dietary Department Supervisor John Campbell and Administrator Haswell that they believed the employees in the dietary department to be deliberately failing to perform their work in a timely fashion and that the employees would have been disciplined even in the absence of protected concerted activities engaged in by them such as their refusal to work overtime. *Wright Line*, supra; *Roure Bertand*, supra.

I find that the record clearly establishes that the Respondent changed the breaktimes of the dietary employees on at least two occasions thus effecting changes in their hours and terms and conditions of employment without affording the Union an opportunity to bargain concerning these changes and that Respondent thereby violated Section 8(a)(1) and (5) of the Act., *Sheraton Hotel Waterbury*, supra.

I find that Respondent also violated Section 8(a)(1) and (5) of the Act by its failure and refusal to timely furnish the Union with copies of the warnings issued to the employees represented by the Union following each of the three oral and one written request for them. These warnings constituted disciplinary action and the Union clearly had a responsibility and need to review them in its role as collective-bargaining representa-

tive. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Leland Stanford, Junior University*, 262 NLRB 136, 139 (1982).

G. Bentley Gardens Nursing Facility Located in West Haven, Connecticut 6–CA–25548–5 (formerly 34–CA–5805)

This case was dismissed by me at the hearing following the withdrawal of the complaint by the General Counsel.

H. Park Haven Care Center Located in Smithton, Illinois 6–CA–25548–6 (formerly 14–CA–22283)

Statement of the Case

The charge in this case was filed by Service Employees International Union, Local 50, AFL–CIO (the Charging Party, Local 50, or the Union) on January 19, 1993. The complaint alleges, Respondent admits, and I find that the following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the Employer at its Smithton, Illinois, facility; excluding office clerical, activities, maintenance, confidential employees and guards, professional employees and supervisors as defined in the Act.

The complaint further alleges, Respondent admits and I find that on or about February 1, 1991, the Union was certified as the exclusive collective-bargaining representative of the unit. The Union and the Respondent are parties to a labor agreement effective from April 1, 1992, through March 31, 1995.

The complaint alleges that on or about December 28, 1992, the Union orally requested that Respondent furnish it with timecards for all employees of Respondent from December 2, 1992, forward, that by its letter dated January 4, 1993, the Union reaffirmed and renewed its request for the information set forth above, that the requested information is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit, that by letter dated January 11, 1992, Respondent through its administrator, Joyce Heege, refused to provide the information and since that date Respondent has failed and refused to furnish some of the information and has unreasonably delayed in providing some of the information. The foregoing conduct by Respondent is alleged to have violated Section 8(a)(1) and (5) of the Act. The Respondent denies the commission of any violations of the Act.

Facts

The complaint alleges a violation of Section 8(a)(5) and (1) of the Act by Respondent's refusal to furnish information. On December 2, 1992, Joyce Heege, the administrator of the Park Haven Care Center, met with all personnel of the facility including managerial and supervisory and unit and nonunit included employees, in an "In Service" meeting to discuss an ongoing problem with tardiness and absenteeism. According to the unrebutted testimony of Heege whom I credit, she informed all of the employees of the problem and circulated a copy of the labor agreement clause setting out the Respondent's attendance policy including rules on absenteeism and tardiness. She also addressed what was known as the "seven minute grace period" which some employees had come to believe permitted them to be up to 7 minutes late without being marked as tardy. She informed the employees that the "seven minute grace period" was for payroll purposes only whereby an employee's pay was not docked if he or she clocked in within 7 minutes of their starting time, but that the employees were nonetheless tardy and would be marked as such. The nonunit and the unit employees were required to punch a timeclock. The attendance policy for nonunit employees is set out in the employees' personnel manual which is given employees and reviewed with them upon their employment. Although she passed around copies of the union contract clause covering attendance at the meeting, she did not pass out copies of the portion of the personnel manual covering nonunit employees at the meeting. Subsequently, several of the unit employees received discipline for infractions of the attendance clause by reason of their tardiness for as little as 1 minute late. This gave rise to several grievances filed by the employees. The parties met pursuant to the grievance procedure on December 28, 1992, with the grievants represented by Union Representative Terri Coburn and Respondent represented by Administrator Joyce Heege and Joe Maniaci, one of Respondent's human resource representatives for Region 5 which covers portions of Missouri, Illinois, and Kentucky. Maniaci is part of the Regional Office of Associate Relations located in Crestwood, Missouri, and reports to Associate Relations Director Robert Findeiss and is responsible for 30 nursing home facilities. Although his office is in Crestwood, Missouri, he travels to the various facilities and is available by telephone for assistance in personnel matters to the nursing homes' managers and employees including recruiting, benefits and training, and labor relations. At the grievance meeting Coburn withdrew grievances on behalf of two of the five grievants on the tardiness issue who had not shown up at the grievance meeting. Part of the grievance was based on the unit employees concern that they were receiving disparate treatment by management's discipline of them because of their union membership, whereas they believed that nonunit employees were not being disciplined for tardiness. Coburn testified that in order to satisfy the grievants, she requested the attendance records of both the unit and nonunit employees. Coburn explained at the grievance meeting that the grievants believed they were being treated differently than nonunit employees and that the timecards of nonunit as well as unit employees were being sought to resolve the matter. Maniaci told her he did not see any problem with furnishing the attendance records of the unit employees, but would have to check with his immediate supervisor, Robert Findeiss. He checked by telephone and was told by Findeiss not to turn over the attendance records of the nonunit employees to Coburn. The Union reiterated its request in its letter of January 4, 1993. Respondent's decision was confirmed in a letter of January 11, 1993, written by Heege to Coburn and Respondent did not furnish the records of the nonunit employees to the Union, nor those of the unit employees. Subsequently, on January 19, 1993, the Union filed the underlying charge of this complaint with the Board. Subsequently, the Respondent and the Union reached agreement and the Respondent turned over some attendance records and discipline records relating to attendance of its nonunit employees, and the Union filed a withdrawal. The Region and the Respondent entered into a settlement agreement which was initially signed by the Regional Director of Region 14, but subsequently that signature was scratched out prior to the Respondent's being permitted to sign the settlement agreement and the Respondent was informed by a Board representative that the Board was not going to take the settlement because of the various other complaints filed against

Respondent and other pending cases involving Respondent and the Board's previous decision in *Beverly I*.

Analysis

I find the foregoing facts which are undisputed support a finding that Respondent violated Section 8(a)(5) and (1) of the Act by reason of Respondent's failure to furnish the Union with the attendance and disciplinary records involving attendance of its nonunit employees on the Union's request therefor in processing the grievances of discipline issued to the unit members for tardiness. As the concern of the employees which led to the filing of the grievances, according to the unrebutted testimony of Coburn which I credit, was that they were being subjected to disparate treatment, it was essential to the resolution of the grievances that the attendance records of both unit and nonunit employees be reviewed to resolve the grievances. The timecards of the unit employees were essential to a determination as to whether there was disparate treatment of the unit employees within the unit whereas the timecards of the nonunit employees were essential to a determination as to whether the unit employees were being treated differently than the nonunit employees. Although it is undisputed that the attendance policy set out in the labor agreement covering unit employees was not the same as the one set out in the employee handbook covering nonunit employees, this is not determinative here. Rather it is noteworthy that at the in-service meeting Heege told all the employees (both unit and nonunit employees) that Respondent would adhere strictly to the attendance policy and that the "seven minute" grace period was to be used only for payroll purposes, but not for attendance purposes. Thus the Union in its representation of the unit employees who were issued warnings, clearly had a legitimate interest in determining if they were being treated differently than other employees, particularly where the discipline as here could lead to discharge. See *Westinghouse Electric Corp*., 304 NLRB 703 at 708 (1991), citing *NLRB v. Associated General Contractors of California*, 633 F.2d 766, 771 fn. 6 (9th Cir. 1980). I do not find the settlement issued to be determinative or to bar the finding of the unfair labor practice herein.

I. Garden Terrace Nursing Center Located in Douglasville, Georgia 6–CA–25548–7 (formerly 10–CA–26355), 6–CA–25548–10 (formerly 10–CA–26523)

Statement of the Case

The charge in Case 6–CA–25548–7 (formerly 10–CA–26355) was filed by United Food and Commercial Workers International Union, Local 1063, AFL–CIO, CLC (the Charging Party, Local 1063, or the Union) on November 12, 1992, and the first amended charge in that case was filed by the Charging Party on December 29, 1992.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by the following:

(a) Respondent's dietary manager, Debra Rice, on or about October 28, 1992, in and about the vicinity of the nursing home, interrogated its employees concerning their union membership, activities, and desires and that of its other employees.

(b) Rice, on or about October 28, 1992, at the nursing home created an impression of surveillance of its employees' union activities by telling employees it knew who had attended a union meeting the night before.

(c) Respondent by Personnel Coordinator Karen Goodson on October 28, 1992, and by Rice on November 2, 1992, at the nursing home prohibited its employees from discussing the Union.

(d) Rice on or about October 28, 1992, at the nursing home, threatened employees that they would lose benefits if the Union were selected as the collective-bargaining representative of the employees.

(e) Rice on or about November 2, 1992, threatened employees with disciplinary action if they discussed the Union.

(f) Rice, on or about November 19, 1992, threatened employees that employees would be laid off if the Union were selected as the collective-bargaining representative of the employees.

(g) Goodson on or about October 28, 1992, removed union literature from nonworking areas.

(h) Respondent, on or about January 19, 1993, in and about the vicinity of its nursing home required all day shift employees to attend a meeting in which it sponsored, ratified, and/or acquiesced in the statements of antiunion employees to the effect that its employees should form their own independent labor organization in order to bargain with management and "get what they wanted."

(i) Respondent, by its supervisors and agents, on or about January 21, 1993, at its nursing home, engaged in surveillance of employees exercising their right to vote in a Board-conducted election.

(j) Respondent by its supervisors and agents, on or about January 21, 1993, in and about the vicinity of its nursing home, on the day of a Board-conducted election, before, during, and between the polling times of the election, permitted antiunion campaigning throughout its facility by employees, while closely monitoring the whereabouts and conversations of prounion employees, including ordering employees who were known union supporters to leave the premises, and escorting them to the exits of the nursing home.

Respondent denies the commission of any unfair labor practices. Also consolidated with the complaint are objections to the election in Case 6–RC–11201 (formerly 8–RC–14773).

Background

In October of 1992, the Union commenced an organizational campaign among the employees in the aforementioned unit. An earlier campaign commenced in late 1991 had ended in the spring of 1992, without proceeding to an election. Respondent in paragraph 1 of its answer to the complaint has denied service of the charges specified in paragraph 1(o), (s), (t), and (u) of the consolidated complaint on the ground that the information "is uniquely in the possession of the General Counsel." The formal papers received in evidence establish the dates of filing and service of the charges on Respondent. I accordingly find that Respondent's aforesaid denial in the absence of any justification is without merit, and it is stricken. *Superior Industries International*, 295 NLRB 320 (1989), and cases cited at footnote 2. It is admitted by Respondent that Personnel Coordinator Karen Goodson (Henry), Dietary Manager Debra Rice, Director of Human Resources E. Abe Emery, Social Services Director Jed Butler, and Evening Shift Supervisor Pat Boolukos were at all material times, supervisors as defined in Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. Emery was in charge of the Respondent's antiunion campaign in this case and was assisted by Human Resources Representative Lisa Jones who reported to him and they both conducted the Respondent's antiunion campaign on a day-to-day basis until the election held on January 21, 1993.

THE ALLEGED UNFAIR LABOR PRACTICES

A. Interrogation and Creation of Impression of Surveillance

James Eric Van Sant, an employee in the dietary department testified that in late October 1992 he attended a union meeting and the next day his supervisor, Debra Rice, initiated a conversation in the central dining room, with only the two of them present, and told him, "She knew I'd been to a union meeting and that she knew how many people was involved supporting the Union . . . . She asked me how many people was there." Van Sant testified, "I just went on and returned to work."

Debra Rice testified that in mid- to late-October 1992, Van Sant came to her office and asked if she knew that the Union was back and told her they had called him at home the night before and told him they were going to have a meeting at Shoney's (a restaurant) at 7 p.m. and asked him to come. He told Rice he was not sure if he would go "because he was afraid that they would start harassing him and threatening him like they did the time before in the first campaign and that if that happened that he would just quit." Rice testified that she told him she did not want him to quit as he was a good employee, and that he then asked if he could talk to the facility administrator, Marsha Durham, and she told him she was sure he could and that he asked her to set up an appointment which she did. Rice testified further that Van Sant asked her if he could be harassed by union supporters during working time and she told him they should not "harass" him during working time but that "we" had no control over what happened at home or on his breaktimes. Administrator Durham testified she subsequently met with Van Sant who told her he was concerned because he was being harassed at home by union supporters and was asking for her help in trying to resolve the problem. Van Sant testified he did not remember this meeting and subsequently testified it had been so long ago, he did not remember. Rice testified that the day after Van Sant had told her about the union meeting, Van Sant approached her in the dining room and told her he had gone to the meeting the night before and told her "some of the people that were there" and left when another employee approached. On cross-examination Van Sant was asked whether it was true that after the union meeting he went to Rice on his own initiative and told her what had happened. He denied this. He also denied having told Rice the names of employees who had attended these meetings or having offered to do so. Durham testified she had met with Rice at his request concerning this.

Analysis

I credit the testimony of Van Sant over that of Rice and find that Rice initiated the conversation after the meeting and told him she knew he had been to a union meeting and knew the people involved and asked him how many people were there. In making this determination I note that Van Sant is currently employed by the Respondent and had been so employed over 7 years at the time of his testimony and find it unlikely he would fabricate this story against his employer and incur their displeasure given his long-term investment in his employment. I also observed his demeanor on the stand and find that while he was obviously nervous, this did not convince me that he was fabricating the incident. Assuming arguendo that the meeting with Durham occurred as testified to by Durham this does not obviate the violation committed by Rice. I thus find that Respondent by its supervisor and agent Debra Rice violated Section 8(a)(1) of the Act by creating the impression of surveillance of the union meeting and by interrogating Van Sant concerning how many employees were present at the meeting.

B. Alleged Removal of Union Literature Alleged Prohibition on Discussion of Union

Toni Oman, a former employee whose employment terminated in July 1993, testified that in late 1992, she was at the nursing home on her day off and was talking to employee Tommie London about the Union in the shower room on the 300 unit and was showing London union pamphlets and letters and was explaining the Union to London. Shortly thereafter, Personnel Supervisor Karen Goodson (Henry) came into the shower room and asked them what they were talking about and they told her they were talking about the Union. Goodson asked if London was on break and London replied that she was and they all went out of the shower room and Goodson pulled London's timecard to determine whether she was on break. As they walked out to the timeclock Goodson said she was personally offended that Oman was there on behalf of the Union and Oman replied she was offended by her low paycheck. They (Oman and Goodson) then went to Goodson's office and continued to talk about the Union and Goodson told her she could call an 800 telephone number at the corporate office concerning complaints or needs. Oman later testified that during the conversation in the shower room Goodson said that "somebody could get into trouble for it" in reference to the union pamphlets and paper Oman had and that Oman told her the employees would not get into trouble for discussing the Union.

Goodson testified that on October 28, 1992, she spoke to Oman on two occasions. Initially, she spoke to her in the 300 dining room which is used for employee breaks and resident meals around lunchtime. She was scheduling employees to attend the Respondent's antiunion meetings and Administrator Durham, on learning that Oman was in the building on her day off, asked Goodson to check if Oman could attend one of the Respondent's meetings being held that day since she was present. She approached Oman and employee Beverly Greeson who were having lunch together in the dining room and asked if she could attend the meeting. Oman replied that she could not as she had to take her automobile to be checked. At the time Goodson observed a piece of paper on the table and she "took it away." There were two or three small tables together and no one was sitting at the place in front of the piece of paper. Goodson testified she picked up the paper as a matter of general tidiness as it appeared to be trash and it was near the residents' lunchtime. On cross-examination Goodson testified she did not know what the piece of paper was until after she started reading it. She testified that she had always picked up pieces of paper from all over the building when she had seen them laying around and had thrown away such items as Avon books, Home Interior books, and Tupperware books before and since this incident as solicitation materials are not allowed in the resident care areas.

Goodson testified further that Oman left the dining room and she (Goodson) left the dining room a few seconds later and did not see Oman anywhere down the long hall and so she went into the bath area as this was the only closed door where Oman could have been and she "looked in there to see if that is where she went." She observed Oman in there with employees Tommie London and Dewayne Morgan (a CNA) and Oman immediately shoved a piece of paper into her pocket. Goodson asked

London and Morgan if they were on the clock. Morgan said she was and Goodson told her to "get back to work." London said she was on a break. Goodson then told Oman she could not interrupt employees while they were working. Subsequently, as they walked from the bath area Oman told her that the piece of paper she had put in her pocket was a statement that the employees wanted to have a vote on the decision to have a union, and that she felt there were matters not being resolved by the Respondent. Goodson told her there was a grievance procedure and that she (Oman) should try it before saying it would not work. She testified she did not remember saying anything like she was personally offended by the Union.

With respect to the removal of union literature Oman testified that in late October or early November she took union materials and pamphlets she had obtained from the union meeting held in the latter half of October and placed them in the activity room in unit 300 which is also used as a lunchroom and she laid them on little tables beside the chairs. While she was eating lunch with Beverly Greeson she observed a management employee by the name of Steve Wagner pick one up and leave the room. She testified she is not positive who did it but she observed a female management employee pick the remaining pamphlets up and remove them all. She testified she has previously observed newspapers, sale papers, Avon books, and Home Interior books in the area, but had never before seen a supervisor remove them.

In addition to these incidents Van Sant testified that during a conversation with his supervisor, Debra Rice, in mid-November 1992 in the kitchen concerning the Union, that Rice told him that employees could not talk about the Union on the clock or on Respondent's premises and that if they did, they would be written up and with three writeups would be terminated. Rice testified that on an occasion about October 28, when she and Van Sant were taking a break on the back dock, he said his father had told him that if he kept talking to the "Union people" that he could be fired and that she told him this was not so and he could only be terminated for not doing his work and that he was a good employee and did not have to worry about it.

Analysis

With respect to the removal of union literature I find the testimony of Oman is insufficient to establish that the union literature was removed by a member of management, as she was unable to identify specifically who removed the literature as opposed to merely picking up a single pamphlet as Goodson did and as Oman testified that management employee Wagner did.

With respect to the admonition by Goodson that employees could get into trouble for discussing the Union, I find Oman's testimony was credible and that Respondent thereby violated Section 8(a)(1) of the Act. With respect to Van Sant's testimony that his supervisor, Rice, threatened discipline for talking about the Union on the clock or on the Respondent's premises, I find that this was an overly broad prohibition and also constituted disparate treatment as discussed infra in this decision as prounion employees were permitted by Respondent to campaign on Respondent's premises during worktime and also constituted an unlawful threat and that Respondent thereby violated Section 8(a)(1) of the Act.

C. The Alleged Threat of Layoff

Van Sant testified that during the same conversation with Rice on the back dock in mid-November, set out above in this decision, Rice told him, "That if the Union was to get in that they'd start laying people off because they couldn't afford to pay us." Van Sant also testified that after this conversation he overheard a conversation among Rice and Supervisors Katie Hood and Diane Wright while he was putting up groceries in the kitchen. He heard Rice tell the other supervisors that "they needed to change employees' minds about the Union." He also heard her say, "that if the Union got in that we'd be all called out on strike if we didn't get what we wanted from the Company and then they'd start laying us off because they couldn't afford to pay us." Neither Hood nor Wright were called to testify to refute Van Sant's testimony. Rice's version of the conversation at the dock was that Van Sant wanted to know if the employees "could be replaced if they went on strike and I told him that if there was a strike, that they would—they could be replaced during that time because we had to take care of the residents." On cross-examination Rice acknowledged that there had been no discussion of "replacement employees" during management meetings she had attended prior to that time and initially stated she had learned of replacement employees from an article posted by the timeclock. However, she also subsequently acknowledged on cross-examination that the article was not placed there until 3 weeks prior to the election which was substantially later than the conversations with Van Sant on the dock or the supervisors in the kitchen both of which occurred in November.

Analysis

I credit the testimony of Van Sant and find that the Respondent thereby violated Section 8(a)(1) of the Act by the issuance of the unlawful threat of layoff by Rice. I found Van Sant's version more likely then that of Rice and found her testimony concerning her acquiring knowledge of "replacement employees" inconsistent. Additionally as noted above, I note that Van Sant was currently employed by Respondent at the time of the hearing and find it unlikely that he would have fabricated this incident and risk Respondent's displeasure thereby.

D. The Alleged Threat of Loss of Benefits

The complaint alleges that Dietary Manager Rice, on or about December 28, 1992, threatened employees that they would lose benefits if they selected the Union as their collective-bargaining representative. The General Counsel relies on testimony from Van Sant concerning a conversation on the back dock outside the kitchen approximately mid-November 1992, wherein Rice told him "we didn't need a union" at the Respondent's facility and that if the Union won the election "they'd just take our money and we didn't need no outsiders to solve our problems. We could do it ourselves." The General Counsel contends that these statements by Rice "were designed to impress upon Van Sant that selecting the Union as their collective-bargaining agent would be financially detrimental to employees with nothing in return that Respondent could not provide to them," and therefore coercive and violative of Section 8(a)(1) of the Act.

Rice testified that about October 28, 1992, on the back dock Van Sant told her the union people had promised him a $5 raise "and I told him that if they were to come in, then they would have negotiations, but nothing was guaranteed. He could get more or less or it could be the same."

Analysis

It is obvious that those two conversations must have occurred at different times. I thus find that Rice did not directly refute the testimony of Van Sant concerning a conversation around mid-November 1992. Therefore I credit Van Sant's unrebutted testimony regarding the statements by Rice concerning the lack of a need for a union. However, I do not find that these statements rise to the level of a violation of the Act, but are merely opinions that the Union was not necessary to solve problems.

E. Alleged Promotion of an Independent Union

This allegation concerns statements made, by longtime CNA Tommie London, at a series of captive audience meetings held by Respondent on January 19, 1994. On January 18, CNAs Tommie London, Betty Smith, and CNA/control supply clerk Ann Ivy went to Administrator Durham and asked for permission to speak to the employees at the upcoming meetings concerning the Union. Durham testified that she gave them permission to do so, but had no knowledge as to what they would say. All three employees spoke in opposition to the Union. It is a matter of dispute but some employees testified that during the meetings CNA London told the employees they could form their own group or union to deal with management. London admitted she had asked prior to the meeting in talking with coemployee Jeff Hensley, "Why can't we be our own Union?" but contended she had not said this at any of the meetings. Ivy testified that London said, "Let's form our own group, not a Union." Employee Jeff Hensley was not permitted to speak at the meeting in favor of the Union, Emery testified he was disrupting the meeting. Employee Oman testified that Hensley was not disruptive. It is undisputed that Administrator Durham did nothing to disavow the statements of London, Ivy, or Smith.

Analysis

From the foregoing the General Counsel contends that the Respondent violated the Act by the promotion of an independent union. I find that the evidence establishes a violation of Section 8(a)(1) of the Act as the statements by employees in opposition to the Union (and specifically London) were not disavowed by the employer at this meeting. Rather there was testimony that London proceeded to urge this in all of the meetings held that day.

F. Alleged Surveillance of Employees on Election Day

This allegation concerns the placement by Emery of Social Services Director Jed Butler to stand at the double doors leading to the 300 activity room as the election was conducted in a small room which was accessible only through the 300 activity room. Emery testified that Butler was assigned this post to keep residents out of the polling area. He also told Butler that if he saw anyone wearing a "Vote No" button to politely ask that they remove it but not to say anything to anyone wearing a "Vote Yes" or prounion ribbon or button. Butler stood there only during the morning session as the union business agent objected and Emery removed Butler from this post for the second voting session. Butler testified he was told by Emery to only allow employees who were voting to go through the doors into activity room 300 and to ask employees wearing antiunion buttons to remove them before entering to vote but not to say anything to employees wearing prounion ribbons. Butler testified that normally "Residents, staff, visitors, just about everybody" passes through the double doors on a regular workday into the activity dining area. If individuals were going to get snacks out of the break area which is in this room, he asked them to come out as soon as they had obtained the snack.

Analysis

I find the evidence is insufficient to establish a violation of the Act by reason of the posting of Butler to control the individuals entering activity room 300 to the polling area. Under the circumstances of confused and elderly residents nearby and the frequent use of this area by visitors and staff as well as the residents, this appears to be a reasonable precaution to ensure that nonvoters did not enter the polling area and does not rise to a violation of the Act.

G. Alleged Disparate Enforcement of Prohibitions on Campaigning

It is alleged that Respondent permitted antiunion campaigning at the nursing home but simultaneously curbed campaigning by union adherents among its employees as stated by the General Counsel in brief "by monitoring their whereabouts and conversations, ordering them to leave the premises, and escorting them to the exits of Respondent's facility." There was substantial testimony by employees concerning this allegation. Employees Jeffrey Hensley and Rebecca Mooneyham testified that Rosilee Busbee, a former employee who had actively opposed the Union in the prior organizational campaign was seen at the nursing home on a number of occasions the entire day of the election. Busbee has a grandmother in the nursing home and furnishes private care to some patients but is not normally present the entire day. Hensley observed Busbee tell CNAs to vote against the Union. Hensley and employee Janet Holland also testified that they observed employee Ann Ivy who also opposed the Union standing next to the timeclock on the day of the election and urging employees who were reporting to work and who were receiving their paychecks to vote "no." Hensley testified he observed Ivy and employee Betty Smith who also opposed the Union urging employees to vote against the Union. Busbee was not called to testify. Ivy and Smith denied having engaged in antiunion campaigning on election day. I credit the testimony of Hensley, Mooneyham, and Holland as set out above which testimony I found to be explicit and convincing. I also note their status as current employees at the time of the hearing and find it unlikely they would falsely testify about these incidents in opposition to their employer. Mooneyham also testified she observed personnel coordinator Karen Goodson tell employees to vote no as she gave them their paychecks on election day. Goodson's account of this incident was that she was merely inquiring whether the employees had voted and telling them to vote if they had not voted. I credit Mooneyham's testimony. Additionally Hensley testified that Evening Shift Supervisor Pat Boolukos who had previously voiced her opposition to the Union in an employee meeting, walked two employees down hallways to vote after inquiring whether they had voted and learning they had not as yet. Boolukos denied this. I credit Hensley's testimony in this regard.

Conversely the testimony presented by the General Counsel also showed that the Respondent sought to limit or discourage prounion employees from engaging in campaign activities. Accordingly both Maintenance Supervisor Richard Mathis and Buddy Durham (the husband of Administrator Marsha Durham and a maintenance supervisor at another of Respondent's facilities) were posted at the front and rear doors of the facility, ostensibly according to Administrator Durham and Human Re-

sources Director Abe Emery, to protect against vandalism by employees to vehicles (as an automobile had had a window broken on the parking lot although there was no evidence this incident was related to the Union's organizational campaign) and also to keep entrances open for emergency vehicles. During the morning shift both Mathis and Emery told prounion employees who were handbilling at the front door that they could not do so. Upon being told by the employees they had a right to do so after the employees checked with a union official, they relented and Mathis stood at the door observing these activities the entire time.

Additionally Mooneyham who was one of the employees who had been handbilling testified that Pam Almond, a former employee who was visiting a resident on the day of the election, and stopped briefly to talk to Mooneyham, was shown to the exit door by Emery and Human Resources Representative Lisa Jones who told Almond that she was not allowed to talk to Mooneyham and had to leave the building. Emery denied this incident. Lisa Jones did not testify. I credit Mooneyham. Employee Christine Oyler who was off duty had also engaged in the handbilling. After she was finished handbilling she went into the nursing home and spoke with employees Toni Oman and Gaynell Caldwell. She then started to leave and Emery told her, "You need to leave now" and also said ".□.□. this is a warning." Emery admits to stopping Oyler from talking to an employee but contended she was "interrupting the workforce." Emery denied escorting Oyler to an exit. I credit Oyler's explicit testimony in this regard. The General Counsel also contends "that by posting Supervisor Mathis at the entrance to its facility to monitor the Union activities being conducted by the employees there without legitimate justification Respondent violated Section 8(a)(1) of the Act." The General Counsel also argues that "the disparate enforcement of its solicitation policies also constitutes a violation of the Act."

Analysis

I find the record amply supports the General Counsel's contention and the complaint allegation that the Respondent permitted antiunion campaigning on its premises the day of the election but curbed and closely monitored prounion employees from engaging in such activities on its premises on election day. By engaging in this disparate treatment Respondent violated Section 8(a)(1) of the Act.

The Objections

Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 10 of the Board, an election by secret ballot was conducted on January 21, 1993, among employees in the following appropriate unit:

> All full-time and part-time nursing assistants, certified nursing assistants, dietary aides, housekeeping aides, laundry aides, maintenance aides and activity aides, employed by the Employer at its Douglasville, Georgia facility, but excluding administrator, director of nursing, registered nurses, licensed practical nurses, director of staff development, social service director, activities director/coordinator, dietary manager, housekeeping supervisor, business office manager, medical records director, bookkeeper, maintenance supervisor, office clerical employees, professional employees and supervisors as defined in the Act.

There were approximately 154 eligible voters, no void or challenged ballots and 140 valid votes counted with 61 votes cast for and 79 votes cast against the Petitioner Union. On January 28, 1993, the Union timely filed five objections to conduct affecting the result of the election. On September 23, 1993, the Regional Director of Region 6 consolidated these objections in Case 6–RC–10907 (formerly 10–RC–14319) with the hearing in Case 6–CA–26355).

Objections 1, 2, and 5 are sustained. Objection 4 was previously withdrawn by the Petition Union. Objection 3 is overruled.

Objection 1 alleges unlawful surveillance of employees while handbilling prounion literature outside the Employer's facility on the day of the election (January 21, 1993) by Respondent's management employees. The record is undisputed that the Employer stationed the maintenance supervisor of its Garden Terrace facility, Richard Mathis, outside the front entrance of its facility and Buddy Durham, another maintenance supervisor outside of the rear entrance ostensibly to watch the parking lots as one automobile had a window broken previously. There was also testimony that Human Resource Representative Emery and Maintenance Supervisor Mathis initially told the employees they could not handbill outside the front entrance and that Mathis took some of the union literature from employees entering the facility and threw it away. I find that the foregoing constituted unwarranted surveillance of the prounion employees union activities, and that this objection should be sustained.

Objection 2 alleges that in captive audience meetings held for all shifts on January 19, 1993, the Employer permitted three employees to speak expressing antiunion sentiments, urging their fellow employees to vote against the Union and that one of these employees specifically advocated the formation of a "committee"or "group" to deal with the Employer. The record bears this out and the employer did not disavow their statements at any of the series of meetings and permitted the foregoing comments to be expressed repeatedly at each of the several meetings held on that day. I find that this objection should accordingly be sustained as unwarranted interference with the election process.

Objection 3 alleges that the Employer posted a company official at the entrance to the room where the election was being conducted and required prounion employees to remove their yes buttons. I have found that the posting of this management official to direct patients and visitors and employees who were not voting, away from this room was a reasonable exercise of care and not a violation of the Act. There was no testimony to support the allegation of the removal of yes buttons and the official involved (Jed Butler) specifically testified he did not ask prounion employees to remove their yes buttons. I therefore find no basis for sustaining this objection.

Objection 5 alleges that the Employer permitted antiunion campaigning at its facility on election day while restricting and surveilling prounion employees. I have found supra that the Employer did engage in this conduct, I find it was objectionable conduct and the objection is sustained.

Accordingly, Objections 1, 2, and 5 are sustained and the election shall be set aside. Objection 3 is overruled.

J. Gulf Coast Convalescent Center Located in Panama City, Florida 6–CA–25548–8 (formerly 15–CA–11885–1)

Statement of the Case

The charge in this case was filed by Communications Workers of America, Local Union 3114, AFL–CIO (the Charging

Party, Local 3114, or the Union), on August 13, 1992, and the first amended charge in this case was filed by the Charging Party on August 20, 1992.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act as follows:

(a) Regional Director of Human Resources Alvin Taylor, on about July 10, 1992, at its facility, informed Respondent's employees that they were being denied a wage increase because of their union membership, activities, and sympathies.

(b) On about July 17, 1992, Respondent's director of nursing, Hazel Harmon, interrogated its employees about their union membership, activities, and sympathies; and solicited the signatures of employees for an antiunion petition.

(c) On about July 17, 1992, Respondent's charge nurse, Patricia Blanchard, at its facility, prohibited employees from wearing union support pins and directed them to remove union support pins from their uniforms.

The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act as follows:

(a) About July 10, 1992, Respondent reduced the wages of its employees by withholding a wage increase from them.

(b) About August 7, 1992, Respondent increased the wages of its employees by granting them a wage increase.

Respondent denies the commission of any unfair labor practices.

Background

The complaint in this case as amended at the hearing alleges that Respondent violated the Act by denying its employees a wage increase in violation of Section 8(a)(3) and (1) of the Act prior to an election held on August 6, 1992, violated Section 8(a)(1) of the Act by informing its employees they were being denied a wage increase because of their union membership, activities, and sympathies, interrogating its employees, soliciting the signatures of employees for an antiunion petition, prohibiting employees from wearing union support pins, and directing them to remove union support pins from their uniforms, by increasing the employees' wages after the election near the end of June 1992.

Near the end of June 1992, Georgette Walker a CNA at this facility, at the urging of several fellow employees contacted the Union with the assistance of her mother who was a former union representative. On June 26, 1992, D.O.N. Hazel Harmon held a meeting with the 3–11 p.m. shift of CNAs concerning unrelated matters and during that meeting advised the CNAs that she had heard a rumor that day, that a union petition was being circulated. The Respondent denies that it had any knowledge of the union campaign until July 7, when it received a letter from the Union dated July 6 advising it of the union campaign. On July 2 Roger Strickland, the facility administrator, left town on vacation. His last day of work prior to his leaving for vacation was July 1. D.O.N. Harmon was unable to reach him on that date but contacted the area manager, Jackie Dykes, who was able to locate him as he arrived at his vacation destination. Dykes ordered Strickland to return home to be at the facility as soon as possible. Strickland immediately departed, drove through the night and arrived at the facility the next day. The Respondent argues and I find that although Harmon did announce to the staff that she had heard rumors about a petition, she apparently had not confirmed this and had not conveyed this information to other management officials including Administrator Strickland who had left for his vacation on July 2. Thus, I conclude that Respondent's officials including Strickland were unaware of the union campaign until the July 4th weekend. On July 9, the Union filed a representation petition (15–RC–7701) for all full-time and regular part-time nonprofessional employees at the facility. The election was held on August 6 and the Union lost by a vote of 34 to 27. Objections were timely filed and consolidated with this case for hearing and will be discussed infra.

1. The delay of the wage increase and statements of Human Resources Director Taylor regarding it

The testimony presented by both General Counsel and the Respondent established that Administrator Strickland and D.O.N. Harmon had been concerned about the need to obtain an across-the-board wage increase for the professional nursing staff and the CNAs as a result of competitive pressures from the nursing homes in the area and particularly, a recently opened nearby nursing facility. Strickland had recommended a raise to Area Manager Jackie Dykes who was to have presented the information to Vice President of Operations Scott Bell who had the authority to grant the wage increase. Harmon had made a wage survey which had been sent to Dykes. However, Strickland had heard nothing and asked Alvin Taylor, the human resources director for the Region, to intercede with Vice President Bell for him. Taylor contacted both Dykes and Bell and discovered that each contended the decision was not in their control at that point (Dykes contended she had passed the request on to Bell who contended he had not received the request). Taylor then decided to back off and told Strickland he could not intercede for him as there appeared to be a communication problem between Dykes and Bell. As the push for a wage increase had been apparently unsuccessful, on May 25 Strickland renewed the request and supplied additional documentation to Bell and Dykes. In early July, Bell approved the request. However on July 4, Taylor had been contacted by Dykes and informed of the union campaign and he arrived at the facility the next day. According to his testimony he made the decision not to grant the wage increase until after the election to avoid the appearance of a bribe and what he believed would be a resulting unfair labor practice. As an increase had been approved for both the nurses and the CNAs and the nurses were not in the unit the Union sought to represent. Taylor decided to give the increase to the nurses but not to the other employees until after the election. On arriving at the site, Taylor met with the department heads and gave them information on T.I.P.S.[4] He then met with the supervisors and professional staff. On July 10, he met with the "line employees," (CNAs and other nonprofessional employees). Although the testimony in this regard is in dispute as to who brought up the subject of raises, I credit the testimony of Taylor, Harmon, and Strickland as corroborated in part by CNA Jo Ann Lacante, that there was a single meeting set up by Taylor and that Taylor did not bring up the subject of the raise but that it was brought up by the employees. However, I also credit the testimony of the employees that Taylor placed the onus for not granting the wage increase at that time of the union campaign and did not assure the employees that the increase had been approved and would be given as soon as the election was over irrespective of whether they selected the Union or not.

[4] That it was a violation of the Act to threaten, interrogate, promise anything to, or spy on employees concerning their protected Sec. 7 rights.

Analysis

Thus I find accordingly to the unrebutted testimony of Taylor that the wage increase had been approved by Vice President of Operations Bell for both the professional employees (the nurses) and the line staff (CNAs and other aides) but that Taylor decided based on the urging of Harmon to implement the raise for the nurses who were not in the unit being sought by the Union but to withhold the wage increase for the line employees in view of the union campaign. The Respondent argues that it was placed in a difficult position because of its knowledge of the union campaign learned shortly prior to the approval of the wage increase. I find, however, that the record shows that the employees were already aware that Strickland and Harmon had been working on a raise. The record also shows that there was a serious need for a raise for both nurses and line staff (particularly the CNAs) to remain competitive in the local area and that the Gulf Coast facility was operating with an inadequate or barely adequate number of nurses and CNAs to meet Federal and state standards for staffing. Thus it is clear that the raises had been sought and approved in order to meet business requirements. Under these circumstances the withholding of the raise because of the advent of the union campaign was violative of Section 8(a)(1) and (3) of the Act. I also find that the placement on the Union of the blame for the withholding of the raise was violative of Section 8(a)(1) of the Act. *Marshall Durbin Poultry Co*., 310 NLRB 68, 69 (1993); *Uarco, Inc*., 169 NLRB 1153 (1968); and *Atlantic Forest Products*, 282 NLRB 855 (1987).

2. The granting of the wage increase on August 7

Facts

Immediately after the election held on August 6, in which the union campaign was defeated, Vice President of Operations Bell approved the implementation of the raise and it was implemented on August 7.

Analysis

I find that the hurried implementation of the raise at this point served to convey to the employees that they did not need a union to improve their situation and reinforced the earlier placement of the blame for the delay on the Union, and that Respondent thus violated Section 8(a)(1) of the Act. *Middletown Hospital Assn*., 282 NLRB 541 (1986), citing *Progressive Supermarkets*, 259 NLRB 512 (1981); and *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964).

3. The interrogation and solicitation of CNA Jeannie Rogers

Rogers testified that on July 17, at about 12 noon, D.O.N. Harmon asked to see her in her office. Harmon then proceeded to ask Rogers if she was happy with her employment by Respondent. Rogers replied in the affirmative and Harmon then told her she needed her support to get the Union out and asked her to sign a piece of paper in the day room which was apparently being circulated to obtain signatures in opposition to the Union. During the meeting A.D.O.N. Arlene McPherson came in and asked her again if she was happy there. Rogers attempted to turn the subject to the presidential election but was again steered back to the union election and Harmon again asked her to support management and sign the paper. The meeting lasted 45–50 minutes. Rogers resigned her employment for personal reasons in 1993.

Harmon denied that this incident occurred but testified that on a number of occasions Rogers had come to see her and discussed personal problems with her usually in connection with scheduling as Rogers wanted time off. Harmon did acknowledge having seen an off-duty employee wearing a posterboard soliciting support for management on one occasion prior to the election. She did not say anything to him. Harmon did recall one occasion when Rogers was in the office and A.D.O.N. McPherson with whom she shares the office, came in and entered the discussion which was only about personal problems of Rogers. McPherson testified she did not recall any discussions between herself, Harmon and Rogers about the Union but acknowledged that it had been a longtime and that she was not directly involved with the union campaign.

Analysis

I credit the testimony of Rogers as set out above. I found her to be a reliable witness who had good recall, of this incident, and who resigned for personal reasons rather than any disagreement or dissatisfaction with the employer. I accordingly find that Respondent violated Section 8(a)(1) of the Act by the interrogation of Rogers by Harmon concerning her union sympathies and by soliciting Rogers to sign an antiunion petition.

4. Prohibition against the wearing of union pins and directing employees to remove their union pins

It is undisputed that prior to the advent of the union campaign employees were permitted to wear pins for various purposes such as commemorate events and themes some of which were sponsored by Respondent and others of which emanated from individuals. On July 17, CNA Georgette Walker wore a CNA organizer pin on her name tag to work and was directed by Charge Nurse Patricia Blanchard to remove it. At that time other CNAs were present as well as A.D.O.N. McPherson who in response to Walker's request to see a regulation prohibiting the wearing of pins, went to the office and returned with a copy of Respondent's dress code which states, "Employee pins will be worn, school pins, and service award pins may also be worn." Although the policy does not address the wearing of other pins, Walker removed the organizer pin. Administrator Strickland admitted that when he learned CNAs Walker, Linda Dickerson, and Carol Ross were wearing union buttons to work, he directed them to remove them. He also discussed this matter with Taylor. Taylor testified that he reviewed the policy and asked Strickland if other buttons were being worn at the facility and that Strickland replied in the negative and Taylor then told him to prohibit the wearing of union buttons at the facility. In addition as noted above Harmon had not prohibited an employee from wearing an antiunion posterboard soliciting employees to support the management.

Analysis

I accordingly find that Respondent prohibited employees from wearing union pins in violation of Section 8(a)(1) of the Act. *Holladay Park Hospital*, 262 NLRB 278 (1982), citing *The Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. 511 F.2d 527 (5th Cir. 1975).

Objections to the Election at Gulf Coast

Pursuant to a Stipulated Election Agreement, the election was held on August 6, 1992, among employees in the following appropriate unit:

> All full-time and regular part-time nursing assistants, certified nurses aides, dietary aides, cooks, housekeeping aides, laundry aides, activity assistants, and restorative aides employed

by the Employer at its Panama City, Florida facility; excluding all other employees, department heads, registered nurses, licensed practical nurses, medical record clerks, central supply clerks, bookkeepers, guards, professional employees and Supervisors as defined by the Act.

There were 65 eligible voters, no challenged or void ballots, and 61 valid votes were counted with 27 votes cast for the Union and 34 against. Timely objections were filed in Case 6–RC–10906 (formerly 15–RC–7701) and were consolidated with the hearing in Case 6–CA–25548–8 (formerly 15–CA–11885–1). Certain of the objections were withdrawn and remaining are the following two objections:

Objection 1 The employer held "one-on-one meetings, supervisor with employee, behind closed doors, to coerce and intimidate employee to cast a NO vote in the upcoming Union Election."

Objection 2 "The employer withheld an approved wage increase, and stated the reason for doing so, as the employees seeking union representation."

Analysis and Conclusions

In view of the findings that Respondent violated Section 8(a)(1) of the Act by interrogating CNA Rogers concerning her union sympathies and by soliciting her to sign an antiunion petition, Objection 1 is sustained.

In view of the finding that Respondent violated Section 8(a)(1) and (3) of the Act by withholding the wage increase and violated Section 8(a)(1) of the Act by placing the onus for the delay of the wage increase on the Union, Objection 2 is sustained.

I find that each of the instances of objectionable conduct occurred during the critical period and constituted unlawful interference with the election and I recommend that the election be set aside and this case be referred to the Regional Director for the scheduling of another election at a time and place when the effects of the unfair labor practices have sufficiently dissipated and been remedied in order to permit a fair election.

K. Northcrest Nursing Home Located in Napoleon, Ohio 6–CA–25548–9 (formerly 8–CA–25067)

Statement of the Case

The charge in this case was filed by District 1199, The Health Case and Social Services Union, SEIU, AFL–CIO (the Charging Party, District 1199, or the Union), on December 7, 1992.

The complaint alleges that Respondent by its corporate director of associate relations, Rodger Brown, on about November 18, 1992, threatened an employee with suspension because of her union or protected concerted activities and thereby violated Section 8(a)(1) of the Act. The complaint also alleges that on about November 18, 1992, Respondent indefinitely suspended its employee Julie Schriner and on or about November 20, 1992, converted the indefinite suspension to a 3-day suspension and issued a final warning to Julie Schriner and that by each of the actions Respondent violated Section 8(a)(1) and (3) of the Act.

Respondent denies the commission of any unfair labor practices.

Background

This case involves the alleged violation of Section 8(a)(3) and (1) of the Act by the suspension of CNA Julie Schriner at a 24-hour captive audience meeting held by Respondent's representatives the day before a scheduled election. The alleged violation in this case is based on the same conduct which forms the basis for timely Objections 3 and 4 filed by the Union to the election which was held on November 19, 1992, for employees in the following appropriate unit:

All full-time and part-time service and maintenance employees, including licensed practical nurses (LPNs), nurses' aides, certified nurses' aides, housekeeping employees, dietary employees, maintenance employees, laundry employees, activity aides, and restorative aides employed by the Employer at its Napoleon, Ohio facility, but excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act.

On November 19, 1992, pursuant to a Stipulated Election Agreement a Board-conducted election was held among the employees in the aforesaid appropriate unit with 77 eligible votes, 75 valid ballots cast, which the Union lost by a vote of 39 employees approving representation and 36 employees voting for representation. On November 18, the day prior to the election the Respondent held a captive audience meeting. All employees in the appropriate unit were required to attend the meeting. At the meeting Northcrest Nursing Home Administrator Lynn Buckley spoke, followed by Regional Director of Human Resources Jan Chambers for Region 4 which includes the Northcrest Nursing Home. As Chambers began to speak CNA Julie Schriner spoke up in a loud voice as described by Chambers, Rodger Brown who was the corporate director of associate relations[5] and Karen Gifford, Respondent's assistant activities director, who was a CNA at the time of the meeting. Schriner asked whether she would get a chance to ask a question. Schriner was asked by Rodger Brown to sit down. She persisted in repeatedly asking if she could ask a question and when she could tell her side. Rodger Brown told her to leave or she would be suspended. After a span of 3–5 minutes she left the room and went to the secretary's office as directed by Brown. After the close of the meeting, she was joined by Chambers and Brown who asked her to write out her position on what happened and why it had occurred. Schriner said she was not going to write anything at this time and was not going to participate in the meeting without a representative of her own present. At about that time fellow employee Nancy Ferguson appeared at the door and wanted to enter the office to represent Schriner but was forbidden from doing so. She attempted to push the door open and was restrained from doing so by Chambers. Ferguson was suspended. Her suspension is not at issue in this proceeding. Schriner who refused to participate further was then sent home for the rest of the day and return to the facility the following morning to vote which she did at which time she received a suspension of 3 days. Schriner testified she was not paid for the 3 days nor for the remainder of the day when she was sent home. After a review of their records Respondent conceded at the hearing that Schriner was not later repaid for the 3-day suspension and nor was she repaid for the remainder of the day she was sent home. Rodger Brown who

[5]At the time of the hearing Brown was corporate director of communications programs, a position he had held for the preceding 8 months. Brown had been called in to assist in this campaign as the prior director of human resources for Region 4 had recently resigned and Chambers had recently had a baby and could not be at the facility on a full-time basis.

was attached to the corporate office testified that he had not previously assisted in election campaigns, but that in this instance the then regional director for human resources servicing this nursing home had voluntarily terminated his employment rather then move when Respondent moved its regional human resource office from Indiana to Ohio, and new Human Resource Director Chambers who was handling this campaign had recently had a baby and could not be away from her home and child for extended periods for the Respondent's campaign prior to the election. Thus, in this unique situation Brown came to the Northcrest facility to assist in the election campaign on behalf of the Respondent. Rodger Brown testified he had held several small meetings with both management and the employees who were taken into informational meetings in groups of 10 or less employees. In these meetings questions and answer sessions were permitted. However, the 24-hour meeting was attended by all the employees eligible to vote and according to Brown questions were not to be permitted at the 24-hour meeting although he conceded that he did not recall whether any announcement was made to the employees that no questions would be entertained prior to or at the time of the commencement of the meeting until Schriner rose to ask a question. Brown also testified that after the meeting many of the employees approached Administrator Buckley and asked her questions and that this was permitted. Both Brown and Chambers conceded that they were aware that Schriner was a union supporter but contend this had nothing to do with restraining her from asking questions. Rather they testified that it was the loud tone of voice and her repeated disruption of the meeting which led to her suspension for insubordination which is a dischargeable offense as shown in the employees handbook. They testified that in making the decision to suspend Schriner for 3 days they reviewed her personnel file which disclosed that she was a long term employee (over 10 years) with a good record.

They then concluded that her record weighed in her favor and that a suspension rather than discharge was the appropriate response. The administrator was not involved in the decision. Schriner and employee Darlene Babcock testified that as soon as Schriner asked whether she could ask a question Brown who had been on the other side of the room came came up to Schriner and waved his finger in Schriner's face and told her to be quiet. Babcock also testified that Schriner had asked her question in a normal speaking voice. Brown testified he had moved closer to Schriner but that he had not waved his finger in her face.

Analysis

After a review of the foregoing I find that Respondent violated Section 8(a)(3) and (1) of the Act. by its suspension of Schriner. Initially, I noted at the hearing that Schriner has a rather loud tone of voice as she speaks. I credit the testimony of Brown, Chambers, and Gifford that Schriner spoke in a loud tone of voice. However, I also find that Brown's response to this was an overreaction and that her suspension was motivated at least in part by his attempt to silence an opposing view at the meeting as by Respondent's need to continue the meeting, particularly in view of Respondent's departure from its format in prior meetings of permitting employees to ask questions. I thus find that Respondent has established a prima facie case that Schriner was suspended because of her engagement in protected concerted activities in support of the Union in attempting to voice her dissent to the position being taken by management at the meeting. I further find that Respondent has failed to rebut the prima facie case by the preponderance of the evidence. *Wright Line*, supra, *Roure Bertrand*, supra.

Having found the above violation I further find that objections 3 and 4 should be sustained as they are premised on the same underlying conduct by Respondent. Although her manner is raising a question or asking to present the union position may have been disruptive, the Respondent's reaction to this by suspending Schriner immediately prior to the election which action was carried out by Respondent's labor relations representatives instead of the normal managerial hierarchy at the facility was the kind of action that would have a chilling effect on the unit employees who voted in the election the next day. It sent a clear message that Respondent's management would tolerate no interference with its presentation of its position of opposition to the Union and that those who support the Union do so at their own peril. This incident clearly destroyed the laboratory conditions essential to a fair election. Accordingly I find the election must be set aside and a new election held after the remedying of the unfair labor practices and the posting of the appropriate notice by Respondent at a time and place to be determined by the Regional Director.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act and is a single employer within the meaning of the Act.
2. The Unions involved in the individual cases are labor organizations within the meaning of Section 2(5) of the Act.
3. The Respondent violated the Act as set out in the individual cases supra.
4. The above unfair labor practices have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

It is further found that the objections to the elections at the aforesaid facilities are sustained in part as set out supra in this decision.

THE REMEDY

Having found that Respondent has violated the Act, it shall be ordered to cease and desist therefrom, and to take certain affirmative actions, including the rescinding of the unlawful suspension of Julie Schriner and purging of its record of same and a make whole remedy and including the posting of an appropriate notice, designed to effectuate the purposes of the Act. The General Counsel seeks a corporatewide remedy and other relief and the Respondent opposes this. I find on the basis of my review of the decision in *Beverly I*, evidence presented by stipulation of the parties with respect to the single-employer and remedy issues in *Beverly II* (in which case there has been an interim decision issued by the administrative law judge which remains pending before the Board) and my review of the court of appeals case and the Board's decision to accept the remand and issue separate remedies at the individual facilities in *Beverly Enterprises* (*Beverly I*), 316 NLRB 888 (1995), that a broad corporatewide cease-and-desist Order in this case is nonetheless in order. I premise this on the lengthy record of numerous unfair labor practices which the Respondent has committed in the past as set out in *Beverly I* and as found in the instant case before me. While it is true that Respondent has been the subject of substantial efforts at organizing its employees by various unions and that the General Counsel by its decision to consolidate cases under the umbrellas of *Beverly I*, *II*, and *III* may have been "stockpiling" these cases, this does not

justify the commission of numerous unfair labor practices by Respondent. While it is also true that I have not found violations in the discharge cases and some of the other discipline cases which involved alleged retaliation against union supporters, I have found other significant violations. The conclusion I draw from the record as a whole is that Respondent through its corporate office, and regional offices closely monitors organizing and the labor relations policies of its facilities and quickly dispatches human resources personnel to those facilities who assume substantial control of many of the activities at the individual facilities during the course of organizing campaigns up to and including the day of the election or other conclusion of organizing activities. Some of the violations in these cases were committed by regional human resource personnel who are according to the record in these cases given extensive training and often have substantial experience in labor relations. I find that the evidence supports a finding that Respondent engages regularly in brinksmanship as borne out by the individual findings in its campaigns to defeat and deter union organizational efforts. In some instances the individual nursing homes bypassed the bargaining agent where one was in place. Thus, Respondent's zeal to remain unorganized, fosters this brinkmanship as noted by letters of praise for regional officials who are successful in winning elections. In some instances an individual company official or human resources representative may step over the line. While it is undoubtedly true that unfair labor practices are more likely to occur in a facility where organizing efforts are ongoing and the employer opposes the organizing effort as is its right, it does not follow that unfair labor practices are inevitable where organizing efforts are underway. The net effect of these unfair labor practices as borne out by my findings supra that the elections should be set aside is that the employees' rights to organize and engage in union activities under Section 7 of the Act are delayed, thwarted, and denied. To the extent that a corporatewide remedy may serve to remedy the suppression of the employees' Section 7 rights, I find it is warranted. As the Board will have its decision in *Beverly II* before it when it considers the instant decision, it may find that the record in that case adds further support to the appropriateness of a corporatewide order in this case and perhaps to additional relief as sought by the General Counsel and Charging Parties.

With respect to the elections that have been set aside, I find that given the magnitude, scope, and frequency of the unfair labor practices, that a bargaining order is appropriate in the East Moline case to ensure the employees Section 7 rights are not further delayed as I find that the chances of fair election reruns in this case is slight given the extensive background of unfair labor practices. Thus the employees Section 7 rights will continued to be thwarted, delayed, and denied. I recommend that the election be set aside at the Garden Terrace Nursing Center, the Gulf Coast Convalescent Center, and the Northcrest Nursing Home and referred to the Regional Directors for the setting of new elections. With respect to the East Moline Care Center, I recommend that since the bargaining obligation attached on December 24, 1991, at the time of the demand for recognition, that a bargaining order is appropriate, *Sheraton Hotel Waterbury*, supra.

[Recommended Order omitted from publication.]